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Supreme Court, U.S.
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In The Supreme Court Of The United States

REBECCA L MARCHAND, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ALFRED G. MARCHAND, DECEASED,

Petitioner,

v.

JOSHUA MARCHAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

PETITION FOR A WRIT OF CERTIORARI

STEVAN J. SCHOEN, ESQ.
COUNSEL FOR PETITIONER
4 HILLSIDE DRIVE
PLACITAS, NEW MEXICO 87043
(505)867-2802
(505)771-0984 (FAX)
schoenlaw@comcast.net
Counsel for Petitioner

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

QUESTIONS PRESENTED

1. What is the proper distribution of the September 11th Victim Compensation Fund Award? Whether the conflict in legal authority between the Final Report of the Special Master of the September 11th Victims Compensation Fund of 2001 containing the record of his consistent administrate law decisions based upon federal regulations and his administrative law policy and precedent that *no surviving spouse is to receive less then one-half of the award for economic loss*, and whose authority was confirmed in *Schneider v. Feinberg*, 345 F.3rd 135 (2nd Cir. 2003) should be given *Chevron* deference to uphold the rulings of the Special Master of the September 11th Victims Compensation Fund; thereby, reversing the New Mexico Supreme Court's decision in *Marchand v. Marchand*, 2008-NMSC-065, 199 P.3d 281 (N.M. 2008) which eliminated the Fund award to the surviving spouse.

2. Whether under the *Chevron* deference doctrine, a New Mexico State Court should give deference to the regulations and rulings of a Federal agency such as the United States Department of Justice, as administered by the Special Master appointed by the Attorney General of the United States, made in connection with the administration of the September 11th Victims Compensation Fund, and do these federal regulations have the force and effect of law *Chevron U.S.A. Inc. v. Natural Resources Defense Counsel*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed 2d 694, (1984).

3. Mass injury places tremendous strain on judicial resources. Where congress enacts special

legislation, such as the Title IV of the Act, the September 11th Victims Compensation Fund, in response to a national tragedy, to avoid multiplicity of litigation, with inconsistent results, and gives special legal authority to a Special Master; can a State Court ignore the rulings of the Special Master in his administrative law decisions which would guarantee a surviving spouse one-half of the economic award.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment below.

OPINIONS BELOW

The Opinion of the highest state court to review the merits appears at Appendix A to the Petition and is reported at, *Marchand v. Marchand*, 2008-NMSC-065, 199 P.3d 281 (N.M. 2008).

The opinion of the New Mexico Court of Appeals to review the merits appears at Appendix C to the Petition and it is reported at *Marchand v. Marchand*, 142 N.M. 795, 171 P.3d 309 (Ct. App. N.M. 2007)

JURISDICTION

This case originated in state court.

The date on which the highest state court decided the case was October 14, 2008. A copy of the decision of the Supreme Court of New Mexico appears at Appendix A.

A timely petition for rehearing was thereafter denied on the following date: *December 8, 2008*, and a copy of the order denying rehearing by the New Mexico Supreme Court appears at Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a).

LIST OF PARTIES

All the parties appear in the caption of the case on the cover page.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title IV of the *Air Transportation Safety and System Stabilization Act* of 2001, Public Law 107-42, 115 Stat 230 (2001), "The September 11th Victim Compensation Fund" (codified as amended at 49 U.S.C. § 40101 (West Supp. 2003).

STATEMENT OF THE CASE

September 11th. The events of that day have tragically altered and illuminated our times.

Why is this case important enough to be considered by the Supreme Court of the United States? It is important for the same reasons that justify the existence of the September 11th Victim Compensation Fund. Title IV, Pub. L. No. 107-42, 115 Stat. 230. This case must be viewed not only from the perspective of the *victim*, a 37 year old widow but rather from the perspective of the *nation*, a unified community response to a unique and unprecedented national historical tragedy. The Congressional response was the creation of the September 11th Victim Compensation Fund, a public compensation scheme that not only provided financial relief to the victims, but also expressed a shared national grief, horror, and revulsion in response to terrorist atrocities. The September 11th Victim Compensation Fund is truly different because the response to the attacks was so universal and profound nationwide.

In the days following September 11th, Congress enacted special legislation to stabilize the American airline industry and compensate the victims of these tragic events:The Air Transportation and Safety and System Stabilization Act of 2001 ("The Act"). Pub. L. No. 107-42, 115 Stat 230 (codified at 49 U.S.C. § 40101). It is uniquely American experiment and described by many as an unprecedented experiment in American Democracy. See *Hatfield, G.* "The September 11th Victim Compensation Fund: A Unprecedent Experiment in

America Democracy", University of Southern California Legal Studies Working Papers, Working Paper 3, (May, 2005).

Title IV of the Act created the September 11th Victim Compensation Fund. The stated purpose of Title IV of the Act is "to provide compensation to any individual (or relative of a deceased individual) who was physically injured or killed as a result of the terrorist related aircraft crashes of September 11, 2001", *Schneider v. Feinberg*, 345 F. 3d 135 (2d Cir. 2003). When the Victim's Compensation Fund was established, it set off a series of debates on the logic of compensation for the victims of terrorist acts; whether federal compensation for injuries is appropriate, and how do injuries or deaths caused by acts of terrorists against us as a nation differ from those caused in other situations? Also, what criteria should we consider when determining victim compensation, and the distribution of victim compensation? See *Culhane, J*, "Tort Compensation and Two Kinds of Justice" 55 Rutgers L. Rev. 1027 (2003), and *Mullinex, L.* "The September 11th Victim Compensation Fund: Fund Approaches to Mass Tort Litigation" 9 Conn. Ins. L.J. 121 (2002), and *Rabin, R. L.*, "The Quest for Fairness in Compensating Victims of September 11th, 49 Clev. St. L. R. 573 (2001). Shapo, M., *Compensation for Victims of Terrorism*, Oceana Publications, 2005.

Alfred G. Marchand was a flight attendant on United Airlines Flight 175, that terrorists caused to crash into the World Trade Center in New York City on September 11, 2001. He was the sole New Mexico resident to die in the tragic events of that day. He died intestate, survived by his wife, Rebecca

Marchand, his dependent stepson Trae Hale, his adult non-dependent son by a previous marriage, Joshua Marchand. The surviving spouse, Rebecca Marchand, filed for probate in September of 2001 and she was duly appointed and qualified as the Personal Representative of the Estate of Alfred G. Marchand, Deceased. As Personal Representative, Rebecca Marchand applied to the September 11th Victim Compensation Fund ("the Fund") for victim compensation.

In a case involving a claim on behalf of a person who was killed in the attacks of September 11th, the Act designated the Personal Representative of the Estate as the sole eligible claimant. 28 C.F.R §§ 104.2(a)(2)-(3), (2002). The claimant was required to file a complicated claim form and to provide written notice of the claim to beneficiaries and interested parties to the Estate. 28 C.F.R. § 104.4(b) (2002). Upon receipt of a Fund award, the Personal Representative was legally obligated to distribute the award according to the law, 28 C.F.R. § 104.52 (2002).

The Act authorized the Attorney General of the United States, John Ashcroft to designate a "Special Master", and in consultation with him, promulgate a series of regulations to guide and expedite the award of compensation". See *Schneider v. Feinberg*, 345, F. 32d 145 (2d Cir. 2003). Kenneth Feinberg, Esq., the duly appointed Special Master, was specially authorized to oversee the implementation of the Fund and determine the amounts to be awarded to claimants based upon the harm to the claimant, the facts of the claim, and the

individual circumstances of the claimant. Act, 115 Stat. 230 § 404(a) (2001); § 405 (b)(1)(B)(i)-(ii).

Rebecca Marchand filed a timely claim with the Fund as the Personal Representative of the Estate. Her efforts in pursuing the award included retaining a New York law firm, Kriendler and Kriendler, traveling to New York City for testimony at an administrative law hearing held on April 29, 2004, and preparing an economic loss analysis of Alfred's anticipated income. See Kriendler, J.P. "September 11th Aftermath; A perspective of the VCF and Litigation" 18 Air and Space Law (2004). Although repeatedly requested to help, Joshua Marchand did not participate in presenting his claim to the Fund. Rebecca Marchand submitted a list of all individuals entitled to a Fund award and agreed to distribute any award according to law. The individuals included Rebecca Marchand, as the surviving spouse, Trae Hale as the dependent child and Joshua Marchand, the non-dependent adult son. Rebecca submitted a proposed distribution plan for the award, as required by federal regulations.

The Special Master detailed the final award determination in a letter to Rebecca Marchand dated June 24, 2004. The total award after collateral source offsets was $769,971.66 comprised of an economic loss component of $319,971.88, and non-economic loss awards of $100,000.00 each for Rebecca Marchand and Trae Hale, as spouse and dependent child of the decedent, and $250,000.00 non-economic loss for the Estate of Alfred G. Marchand, Deceased. Joshua Marchand received no award from the Special Master because he was an

adult, non-dependent child who has suffered no compensable "economic" loss.

"Economic loss" is defined in the Act as "any pecuniary loss resulting from harm," Act, Section 402 (7), and economic loss was calculated through a methodology that took into account anticipated lost future benefits, including future income See 28 C.F.R. § 104.43(a).Compensation awards for economic loss were intended to be distributed to the dependents of the decedent. "In no event shall an award . . . be less than $500,000.00 in any case brought on behalf of a deceased victim with a spouse or dependent." (before collateral source compensation) 28 C.F.R. § 104.41 (2001) Noneconomic damages were defined as "losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium . . .and all other nonpecuniary losses of any kind or nature." Act, § 402(9) (2002). Because of the inherent difficulty in determining noneconomic losses for individual claimants, the regulations designated a uniform noneconomic loss award in the sum of $250,000.00 for a deceased and $100,000.00 for the surviving spouse and each decedent of the victim. 28 C.F.R. § 104.44, Sec. 67 Fed. Reg. 11,233. 11,239 (Mar. 13, 2002); (2001). Shortly after the distribution of the Fund award to Rebecca Marchand, as surviving spouse and Personal Representative, Joshua Marchand filed suit against her claiming that he is entitled to the distribution of all of the September 11th Victim Compensation Fund Award.

The District Court of Otero County, New Mexico granted Summary Judgment in favor of Rebecca Marchand, (Appendix D), the surviving spouse by awarding her all of the economic loss compensation of $319,971.88 and one-quarter of the noneconomic loss Estate compensation in the sum of $62,500.00, as provided by the intestate succession laws contained in the New Mexico Probate Code, concerning spousal inheritance rights and community property rights. (Section 45-2-102 NMSA 1978), together with the $100,000.00 noneconomic loss award. Joshua Marchand received judgment from the District Court for $187,500.00 as three-quarters of the noneconomic loss from the Estate, as his intestate share of the Estate under the New Mexico Probate Code, Section 45-2-102 NMSA 1978.

Joshua Marchand appealed the decision of the District Court to the New Mexico Court of Appeals. Upon review of the Summary Judgment, Joshua Marchand was awarded his intestate share of the Estate in the sum of $187,500.00, and one-half of the economic loss pursuant to New Mexico Wrongful Death statute, Section 41-2-3 NMSA 1978 in the sum of $159,985.94. (Appendix C). *Marchand v. Marchand*, 142 N.M. 795, 171 P.3d 309 (2007).

Joshua Marchand was dissatisfied with the decision of the New Mexico Court of Appeals, and he appealed again to the New Mexico Supreme Court. The New Mexico Supreme Court reversed the Summary Judgment and ruled that Joshua Marchand was entitled to all of the economic award from the Victims Compensation Fund in the sum of $319,971.88 and all of the noneconomic award in the

sum of $250,000.00 belonging to the Marchand Estate. Rebecca Marchand, as surviving spouse was left with a fund award of $100,000.00 as the presumed noneconomic loss for the spouse of the deceased victim. 28 C.F.R. 104.44 (2002). (Appendix A). *Marchand v.* Marchand, 2008-NMSC-065. 199 P.3d 281 (N.M. 2008). The rationale given by the New Mexico Supreme Court for the decision premised that collateral offsets potentially available to Rebecca Marchand, eliminated any award share of "the economic loss component of the award".

Rebecca contended that the Special Master had already reduced the award to the Marchand Estate by the total amount of collateral offsets potentially available to her. The result would be a double reduction of collateral offsets from any distribution of the Fund Award by the Estate to the surviving spouse, Rebecca Marchand, as required by the law of intestate distribution; Section 42-2-102 NMSA 1978. The New Mexico Supreme Court gave no other reason than equitable considerations for the elimination of the spousal award. (See Appendix A). *Marchand v. Marchand,* 2008- NMSC-065 199 P.3d 281 (N.M. 2008).

REASONS FOR GRANTING THE PETITION

September 11th. Within days of these horrific events which caused in the untimely deaths of more than 3000 persons in New York, Pennsylvania and Washington, D.C., Congress enacted special legislation to deal with their economic and social consequences. The "Air Transportation Safety and System Stabilization Act of 2001 Pub. Law. No. 107-42, 115 Stat. 230 (2001) (the "Act").

> *The Act was passed in relative haste, just eleven days after September 11th, and its legislative history is scant. The totality of Congressional discussions on the Act can be found at 147 Cong. Rec. S 9589-6606 (Sept 21, 2001) and 147 Cong. Rec. H 5884-5917 (Sept. 21, 2001). Most discussion concerned how best to deal with the economic crises facing the airline industry following September 11th . . . Discussion of Title IV focused on providing Victims of September 11th the opportunity to forgo litigation in favor of a faster, easier and more definite remedy". Graybill v. City of New York,* 247 F.Supp. 2d 345 *(S.D.N.Y. 2002).*

The Act was intended to prevent the collapse of the airline industry by allocating almost 15 billion dollars as a bailout for the airlines. It also created a federally funded scheme to compensate victims of the September 11th terrorist attacks. The Act has been described as a unique experiment in American Democracy", *Hatfield, G.* "The September 11th Victims Compensation Fund; and Unprecedented Experiment in America Democracy" U.S.C. Legal Studies, Working Paper 3, (May, 2005). The Act was designed to deal with the likely tremendous strain on our judicial system resulting from the mass injury. *Mullinex, L.* "The September 11th Victims Compensation Fund: Fund Approaches to Mass Tort Litigation". 9 Conn. Ins. L.J. 121 (2002). The Fund was enacted by Congress, and it is entirely a creature of federal design, funding, administration and implementation. *Alexander, J.C.* "The History

and Structure of the September 11th Victims Compensation Fund". 53 DePaul L. Rev. 692 (2003).The administration of the Fund was placed in the hands of a Special Master, Kenneth Feinberg, Esq., appointed by the Attorney General of the United States Department of Justice.

The purpose of this Petition before the Supreme Court of the United States is to seek justice for the widow, Rebecca Marchand, the thirty-seven (37) year old surviving spouse of the person killed on September 11th. Somehow the New Mexico high court ignored the Final Report of the Special Master and all other sources which confirmed that no surviving spouse should be awarded less than one-half (1/2) of the economic loss portion of the September 11th Victim Compensation Fund Award. See U.S. Department of Justice, Kenneth R. Feinberg, Esq., Special Master "*Final Report of the Special Master for the September 11th Victim Compensation Fund* of 2001, Vol. 1 (2004) ("Final Report").

THE EXPERTISE OF THE SPECIAL MASTER.

The Special Master went to great lengths in his Final Report to explain his rulings concerning the administration of the Fund and the distribution of the Fund awards. The Special Master Wrote:

> Distribution
>
> *The Act's silence regarding the distribution of awards for decedents claims created a huge vacuum in the administration of the Fund. While the*

Act was intended to benefit the families of deceased victims, questions regarding which family members should be included in a plan of distribution and how the award should be allocated were left to the Department (of Justice) and the Special Master to resolve. The Regulations and the procedures developed by the Fund attempted to create a mechanism for the allocation of awards that would be consistent among similarly situated families, efficient, and easy to administer, but would also allow for the consideration of the individual needs of the families. The Department and the Special Master determined that these goals would be best served by distributing the award in a manner consistent with the law of the decedent's domicile. Consistency would be assured by authorizing the Special Master to approve or disapprove the plan depending on whether it complied with state law. Efficiency would be served by requiring the Personal Representative to submit a plan of distribution to the Fund for the Special Master's approval, thereby eliminating the involvement of the state courts, where the Special Master determined that the plan followed state law. Fairness and the valuation of individual factors would be accomplished by allowing the Special

Master to direct distribution to specific family members if the Personal Representative's proposed plan did not appropriately compensate these relatives.

1. Distribution Plan Guidelines

At the outset, claimants required substantially more guidance than that provided by the Regulations in order to submit a plan that the Fund would consider consistent with state law and would ultimately approve. Attorneys also were in need of guidance since even those expert in the applicable state trusts and estates law were often uncertain as to which particular state law rules applied to various portions of the award. In order to clarify the components of an appropriate plan, the Fund provided guidelines on its website, at town meetings, in mailings, and by telephone. Claimants were told that the Personal Representative must provide a proposed distribution plan to the Fund for review prior to payment and that the distribution plan would need to address three components of the award: (1) a non-economic award on behalf of the victim, (2) a non-economic award for a spouse and each dependent, (3) and an economic award. As to these three components, the following guidelines were provided. First, the $250,000 non-

economic presumed award on behalf of the victim was to be distributed in accordance with the victim's will or, in the absence of a will, according to the intestacy law of the state where the victim had been domiciled. The Fund's website provided claimants and their attorneys a chart summarizing the intestacy law for most states where decedents had been domiciled. Second, the $100,000 additional non-economic award for a spouse and each dependent was to be distributed to each qualifying person. Third, the economic loss portion of the award (in most cases the bulk of the award) would be governed by the wrongful death law of the state of the victim's domicile. A chart summarizing the wrongful death law for most applicable states was also posted on the Fund's website.

The review of distribution plans and the process required for approval of a plan proved to be extremely time-consuming for the Fund attorneys. Many claimants found the requirement that the plan account for three different components of the award complex and confusing. Likewise, trusts and estates attorneys accustomed to distributions of estate property and physical injury lawyers familiar with wrongful death awards initially found the hybrid nature of the

Fund's award perplexing. However, as the Program proceeded, the management of the distribution plan process by claimants and attorneys significantly improved. Nevertheless, the process of education of claimants and attorneys in conjunction with evaluating plans and working to achieve approvable plans was ultimately one of the more labor-intensive tasks in administering the Fund. From the claimant's perspective, however, the process was significantly more efficient than that of seeking approval for the distribution of an award from a court of competent jurisdiction.

While claimants and attorneys found the appropriate allocation of the non-economic award to be comparatively simple, the allocation of the economic portion of the award posed greater challenges. Unlike wills and state intestacy laws, which delineate the identity of the distributee as well as the portion of the estate the distributee should receive, the wrongful death law of most states provides that damages should be distributed to those eligible to recover under a state's intestacy law, "in proportion to their pecuniary loss. "A finding of proportionate "pecuniary loss" often requires a court to engage in time consuming fact-finding.

However, the goal of efficient and speedy resolution of claims obviously would not have been served had the Fund regularly engaged in distribution plan hearings to determine the "pecuniary harm" of significant numbers of beneficiaries. In order to avoid this result and provide Personal Representatives and their attorneys with guidance regarding "pecuniary loss," the Fund adopted criteria considered by state courts. Generally, the Fund determined that the economic portion of a plan of distribution would be approved if the allocation either followed the intestate law of the state of domicile or, in the case of distribution between a spouse and children, a formula developed by the New York Surrogate's Courts in *In re Kaiser* Estate that based pecuniary loss on remaining years of dependency. These criteria provided the Personal Representative with some flexibility while still protecting the interests of beneficiaries. For example, the option of relying upon the *Kaiser* formula was particularly helpful to a spouse with older minor children, since under those circumstances the *Kaiser* formula would provide a larger portion of the economic award to a spouse with many years of remaining dependency than an allocation based on the

> intestate laws, which usually split the estate equally between a spouse and children.
>
> In some situations, the Fund concluded that certain state laws created potential hardships for claimants by limiting a spouse's share to less than half of the economic recovery. To address these circumstances, the Special Master determined that, in the interest of both uniformity and fairness, it would be appropriate to allow every Personal Representative the option of utilizing the *Kaiser* formula for allocation of the economic portion of the award . . . Special Master, Final Report, pages 56-58 (emphasis mine).

The Special Master has publicly stated that " . . . there is law that has been tested to see who takes the money. That is what we did . . . half to the spouse and the other half to the children". Feinberg, K. Speech; "Negotiating the September 11th Victim Compensation Fund of 2001: Mass Tort Resolution without Litigation".19 Wash. U. Journal of Law of Policy 21, 25 (2005). The Special Master was authorized by the regulations to provide "adequate guidance for a court of competent jurisdiction and a personal representative in the distribution of the award" 28 C.F.R. § 104.33 (9) (2002). Certainly, to eliminate the spousal award altogether is wrong. The experience of the Special Master who decided more than 2880 cases involving the Fund Awards to decedents should be given deference as compared or

the New Mexico Supreme Court with its "one case" approach.

Thus, the Special Master created an administrative law precedent which he followed in every case to permit a spouse's share of the Fund Award to be at least one-half (1/2) of the economic loss award which he had authority to do under federal regulations and the authority which Congress had given the Special Master.

When asked about his opinion of the New Mexico Supreme Court decision in *Marchand v. Marchand,* the Special Master, Kenneth Feinberg commented:

> *I read the Opinion with great care. My personal view is somewhat different from the conclusion reached by the Court. . . . the Federal 9/11 Fund was designed to compensate those who were deprived of the economic benefit of the victim, and the New Mexico Court is wrong in stating that the only way the Fund awards could be distributed was pursuant to State law. . . . In fact, the 9/11 fund regulations and claim forms made it clear that the award was to be distributed . . . or "as directed by the Special Master". The point was to ensure as much as possible that the people who relied on the income of the victim received the benefits; otherwise, they were deprived of the economic benefit of the victim. As a*

> *result of the New Mexico Court opinion, the non-dependent adult son received excessive compensation; he had no economic loss resulting from the death, yet he received $569,971.88. The minor child received zero economic loss and only obtained the $100,000.00 non-economic benefit. The New Mexico Court took the non-economic awards off the top and then divided the remainder as economic loss, half to the spouse and half to the adult child. . . .if the Fund were still in existence, we probably would have relocated and provided the entire amount to the spouse, consistent with the concepts underlying the 9/11 Fund..*
> *K.Feinberg@feinbergrozer.com,*
> *February 23, 2009.*

Even the other New Mexico Courts are at odds with the *Marchand* decision of the New Mexico Supreme Court. There are three different decisions by three different New Mexico Courts. (See Appendix C, the New Mexico Court of Appeals *Marchand v.* Marchand, 142 N.M. 795, 171 P. 3d 309 (Ct. App. 2007) and Appendix D, State District Court, Summary Judgment in favor of Spouse). In New Mexico, the Courts have disagreed about what to do in this situation because they have no experience with the September 11th Victim Compensation Fund Award, and no other cases as precedent on which to rely. Only the Special Master by virtue of his experience, dedication and wisdom has the relevant authority to create a decisional precedent concerning

the distribution of no less than one-half of the Fund award to the surviving spouse.

CHEVRON DEFERENCE

The Air Transportation and Safety and System Stabilization Act vests administration of the Fund in the "Attorney General, acting through a Special Master appointed by the Attorney General" and authorizes them to "promulgate all procedural as substantive rules for [its] administration" Act §404(a)(2). Furthermore, ". . . the Attorney General, in consultation with the Special Master" was required to "promulgate [procedural] regulations" and regulations governing" other matters determined appropriate by the attorney general" Act §407 (5) (2002).

Following a period of notice and comment, the Attorney General and Special Master timely promulgated regulations relevant to this case which defined statutory terms and establish a "presumed award" scheme. See *Schneider v. Feinberg*, 345 F. 3d 135, 137 (2d Cir. 2003), The Act, § 407 (2001). A particular regulation allowed the Special Master unlimited flexibility to "develop a methodology, schedules, tables or charts" which will permit prospective claimants to estimate determinations of loss of earnings or other benefits 28 C.F.R. § 104.43 (a) (2002).

The purpose of the "Final Report", of the Special Master is to "provide an extensive accounting of the operation and administration of the Fund and *of the final resolution of all claims*" *"Final Report"*, p. 1. The Final Report "outlined the

substantive guidelines adopted by the Fund to evaluate and pay claims, as well as the administrative process established to accomplish these tasks" *Final Report*, p. 2. The Special Master made a point of stating that when: " . . . the Fund concluded that certain state laws created potential hardships for claimants by limiting a spouse's share to less than half of the economic recovery", that "in the interest of both uniformity and fairness", it would be appropriate to allow every Personal Representative the option of utilizing the *Kaiser* formula for allocation of one-half the economic portion of the award to the surviving spouse. "*Final Report* p. 58-59). The Special Master reasoned that each distributee should be entitled to receive a percentage of the award in proportion to the number of years of dependency for which the distributee would have looked to the deceased for support". Final Report, page 93, n. 170.

The Special Master and the Department of Justice should be accorded *deference* by Federal and State Courts in favor of their interpretations of the regulations, presumptive award tables and the consistent, uniform rulings made and reported under the Act. An analysis of whether the Department of Justice's construction of the Act for *deference* purposes comports with the statute's meaning may be undertaken by utilizing the two-step test set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 1045 Ct. 2778, 81 L.Ed. 2d 694843 n. 9 (1984)

> *The judiciary is the final authority on issues of statutory construction, and must reject administrative*

constructions which are contrary to clear congressional intent." Courts therefore look first to "whether Congress has spoke to the precise question at issue" and if so, give effect to the unambiguously expressed intent of congress. Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843 1984). "If the statute is silent, or ambiguous with respect to the specific issue", a court may consider only "whether the agency's answer is based upon a permissible constructive of the statute Id. 844. And it so, the Court must defer to the agency's construction if the statute". Schneider v. Feinberg, 345 F.3d 135, 140 (2d Cir. 2003).

Not all agency interpretations of the agency's organic statute are entitled to Chevron deference. Chevron deference is clearly owed to regulations adopted by formal rule-making after notice and comment, See Christensen v. Harris County, 529, U.S. 576, 586-587 (2000). All of the regulations promulgated by the Department of Justice and by the Special Master were adopted by formal rule making after notice and comment.

"The touchstone is whether the agency interpretation is intended to carry the force of law" (not whether it has been

subjected to formal notice and comment procedures under the APA). United States v. Mead Corp. 533 U.S. 218, 231-232 (2001); See Also Nationsbank of North Carolina v. Variable Annuity Life Ins. Co. 513 U.S. 218 (1995) (Chevron deference given to interpretive letter issued by Comptroller of the currency). Thus, Chevron deference applies where the interpretation is "the type of legislative ruling that would naturally bind more than the parties to the ruling. Schneider v. Feinberg, 345 F. 3d 135, 139 (2d Cir. 2003).

Even interpretive guidelines that lack the force of law but nevertheless "bring the benefit of [an agency's] specialized experience to bear" on the meaning of a statute, are still entitled to "some deference." United States v. Mead, 533 U.S.218 at 234-35, 121 S. Ct. 2164; see Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S. Ct. 161, 89 L.Ed. 124 (1944) ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.

The court in *Schneider v. Feinberg*, found that, "the challenged regulations" were adopted after a period of notice and comment, and are evidently intended to carry the force of law as to all claims submitted to the Fund. Furthermore, the court also found that:

> *. . . accompanying tables were not subject to formal rule-making procedures, but they also exert force of law over all claims because the tables are "the type of legislative ruling that would naturally bind more than the parties to the ruling. Mead, 533 U.S. at 232, 131 S. Ct. 2164. They are meant to guide compensation, and they apply equally to all claimants seeking compensation from the Fund. The district court properly held that to the extent that they do not contradict Title IV's clear and unambiguous meaning Chevron deference is owed to the regulations adopted by formal notice-and-comment procedures and to the presumed-award tables adopted to implement the statute and regulations". Schneider v. Feinberg, 345 F.3d 135, 139 (2d Cir. 2003).*

Interestingly, the Fund's *Interim Rules*, released on December 21, 2001 came with instructions that they would have "the force and effect of law immediately upon publication". See September 11th Victims Compensation Fund of 2001, 66 FR 66274, 66275 (December 21, 2001) (to be codified of 28 C.F.R. 104, "Interim Rules"). Following

an additional comment period, the Department of Justice Released the *Final Rules* governing the Fund on March 13, 2002. These rules altered the *Interim Rules* in only few minor respects. 67 F.R. 11, 233 (March 13, 2002), codified at 28 C.F.R. § 104 ("Final Rules") The Act also give unusual authority to the Special Master when it provided that the Special Master's ". . . determinations shall be final and not subject to judicial review". *Act*, Section 405-(b)(3) 49 U.S.C.A. 40101. The Law of the Fund was established by the Special Master after careful deliberation, based upon congressional intent. His determinations are worthy of our respect.

In the Special Master's own words, in a law review article entitled "Negotiating the September 11th Victim's Compensation Fund", on the issue of the distribution of a fund award to a decedent's spouse ". . . there is law that has been tested to see who takes the money. That is what we did . . .half to the spouse and the other half to the children". Feinberg, K. "Negotiating the September 11th Victims Compensation Fund: Mass Tort Resolution without Litigation" 19 Washington Univ. L.R. 21, 25 (2004).

Rebecca Marchand was just 37 years old when she became a widow. She and her husband, Alfred Marchand were raising her son, Trae. Under the *Kaiser* formula adopted by rule of the Special Master, the Personal Representative would provide a larger portion of the economic award to Rebecca Marchand as a spouse with many years of remaining dependency", as compensation for their economic losses. On the other hand, Joshua Marchand was an adult child with whose remaining years of

dependency had ended. Therefore, the entire economic award, under the Act were pecuniary damages owed to Mrs. Marchand as a dependent spouse for her economic losses resulting from the death of her husband. The New Mexico Supreme Court cited no federal court precedent or Special Master Fund decision in consideration of their decision. The New Mexico Supreme Court appears to have only the blue sky behind its decision. When the New Mexico Supreme Court decided to give the entire economic award and noneconomic award to an adult non-dependent child, there was no precedent for this decision even under New Mexico law.

This case cannot exist in a complete vacuum. The Special Master of the Fund wrestled with the same issues as the New Mexico Supreme Court. There are two books and at least seventeen law review articles dealing with the jurisprudence, legal ethics and philosophy concerning the propriety of compensation awards made by the September 11th Victim Compensation Fund of 2001. They are:

Feinberg, K.F. "*What is Life Worth, The Unpredented Effort to Compensate the Victims of 9/11*", Public Affiars, 2005.

Marshall S. Shapo, "*Compensation for Victims of Terrorism*" Oceana Publications 2005.

Law Review Articles:

J.C. Alexander and R.A. Fein: "The History and Structure of the September 11th Victim Compensation Fund," 53 DePaul Law Review 692 (2003);

John G. Culhane, "Tort Compensation and Two Kinds of Justice," 55 Rutgers L. Rev. 1027, (2003);

Kenneth L. Feinberg, "Negotiating the September 11th Victim Compensation Fund of 2001: Mass Tort Resolution Without Litigation," Washington; University School of Law, Journal of Law and Policy, Vol. 19, page 21, September 14, 2004;

Gillian K. Hadfield, "The September 11th Victim Compensation Fund, An Unprecedented Experiment in American Democracy," (May, 2005) University of Southern California Legal Studies Working Paper Series, Working Paper 3;

James C. Harris, "Why the September 11th Victims Compensation Fund Proves the Case for a New Zealand-Style Compensate Social Insurance Plan in the United States," Northwestern University Law Review, Vol. 100, No. 3 (2006);

Erin G. Holt, "The September 11th Victim Compensation Fund: Legislative Justice Sui Genesis", 59 N.Y.U. Annual Survey, Am, Law 513 (2004);

James P. Kriendler and Brian Alexander, "September 11th Aftermath: A Perspective of the VCF and Litigation", 18 Air & Space Law 7 (2004);

Jonathan D. Melber, Note, "Act of Discretion: Rebutting Cantor Fitzgerald's Critique of the Victim Compensation Fund", 78 N.Y.U. Lt. Rev. 749 (2003);

Linda S. Mullinex, "The Future of Tort Reform: Possible Lesson from the World Trade Center Victim Compensation Fund". 53 Emory L.J. 1315 (2004);

Linda S. Mullinex & Kristen B. Stewart, "The September 11th Victim Compensation Fund; Fund approaches to Mass Tort Litgation", 9 Conn. Ins. L.J. 121 (2002);

Kenneth P. Nolan and Jeanne M. O'Grady, "The Victim Compensation Fund-Looking a Gift Horse in the Mouth," 53 DePaul L. Rev. 231 (2003);

Robert L. Rabin, "The Quest for Fairness in Compensating Victims of September 11th", 49 Clev. St. L. Rev. 573 (2001);

Robert L. Rabin, "The September 11th Victims Compensation Fund", A Circumscribed Response to an Auspicious Model" 53 DePaul Law Review, 769 (2003);

Robert L. Rabin, "September 11th Through the Prism of Victim Compensation" 106 Columbia L. Rev. 473 (2006);

J. Romero, "A Victim's Eye View of the September 11th Victim Compensation Fund", 71 Def. Counsel J. 64 (2004);

Marshall S. Shapo, "Compensation for Terrorism, What Are We Learning", 53 De Paul Rev 805 (2003). March 2002;

Marshall S. Shapo, "Compensation for Victims of Terror: Specialized Jurisprudence of Injury" 36 Ind L.R. 237 (2003) and 30 Hofsha L. Rev. 1245 (2002);

Frank Tinari "Did the 9/11 Victim Compensation Fund Accurately Assess Economic Losses" Vol. 6 Topics in Economic Policy and Analysis, Page 1438, Berkeley Electronic Press.

All of the books and law review articles congratulate the Special Master, Kenneth R. Feinberg, on the soundness of his decisions and his expertise, See R. Rabin, "September 11th Through the Prism of Victim Compensation", 106 Columbia L. R. 464, 473 (2006). Kenneth Feinberg was the Special Master in the Agent Orange proceedings as well as the Powerhouse asbestos consolidations and DES suits in the late 1990's. E. Holt "The September 11th Victim Compensation Funds, Legislative Justice Sui Genesis" 59 N.Y.U. Annual Survey of American Law 513, (2004). After personally presiding over more than 900 Fund hearings, there is no person whose experience, compassion, and understanding is more relevant in this case. Kenneth Feinberg believes that Rebecca Marchand, the surviving spouse should be entitled to share in the Fund Award.

Summary

The Special Master together with the Attorney General promulgated federal regulations, to administer the September 11th Victims Compensation Fund based upon fairness, equity, and uniformity in considering the same thread of economic loss running through all cases involving

decedents leaving a surviving spouse and dependents. The Special Master consistently provided that the share of a surviving spouse of the economic recovery should be no less than one-half of the economic portion of the Fund award. There can be no doubt that if the Fund were still in existence, the Special Master would probably have reallocated and provided the entire amount of economic loss award to the spouse, consistent with the concepts underlying the September 11 Fund".

It is obvious that the person who suffered the greatest economic loss in this case has to be Rebecca Marchand, the surviving spouse. The Special Master delivered the Fund Award to Rebecca Marchand in her capacity as the Personal Representative. Using the *Kaiser* formula authorized by the Special Master, consistent with the appropriate federal regulations and in reliance *Gilmore v. Gilmore.*, 124 N.M. 119, 946 P.2d 1130 (Ct. App. 1997) ("which stated that the law governing distribution of proceeds in a wrongful death claim as the state where the tort and death occurred") (In this case, New York State, The *Kaiser* formula) she attempted to properly distribute the Fund Award. However, the New Mexico Supreme Court took away the Fund award from the surviving spouse, Rebecca, and reallocated it to a non-dependent heir and it did not allow her even one-half of the recovery of economic damages, favored by the Special Master.

The New Mexico decision in the *Marchand* case is the only case in the entire United States to allow a deduction of collateral offsets to reduce the share of the surviving spouse to less than one-half of

the economic recovery, and to allow collateral offsets to be deducted twice from the share of federal economic damages and noneconomic damages awarded to the surviving spouse: so as to eliminate any fund award to the surviving spouse for economic losses.

The New Mexico Court of Appeals in its *Marchand* opinion, by Judge Kennedy (Appendix C) got it right.

> *The Special Master's final award letter to Rebecca states that "[g]enerally, collateral offsets should first be applied to the share of the individual who received the benefits." It further states that pursuant to court order or an arrangement by the parties, a reallocation of collateral offsets may be appropriate under certain circumstances. We do not read this language as directing the trial court to reallocate the offsets, but rather the language provides information as to the origin of the offsets and how they were calculated in coming to the final award amount, in this case, the district court found that collateral offsets deducted from the total damages by the Special Master to arrive at the final award are not subject to review or reallocation, and the district court found that the deduction was consistent with the apparent Congressional intent that deductions be offset against general*

> *economic damages. Based on the discretion given to the Special Master and the state courts by the federal government, we cannot say that the district court erred as a matter of law with regard to collateral offsets. Marchand v. Marchand 142 N.M. 795, 801-802 171 P.3d 309, 315-316 (Ct. App. 2007).*

The New Mexico Court of Appeals did not reduce the Fund Award a second time by deducting collateral offsets, and the surviving spouse received one-half of the economic award. It is the fair result! It is consistent with the Special Master's approach. See *Keinberg, K.L.*, "Negotiating the September 11th Victim Compensation Fund of 2001: Mass Tort Resolution Without Litigation", Washing University, School of Law 19 Journal of Law and Policy 21, 25. (2004). See also R. Rabin "September 11th, Through the Prism of Victim Compensation" 106 Columbia L. Rev. 464, 473 (2006). Even the Special Master determined that no beneficiary should have their award of damages reduced to zero. It should be remembered that the Special Master of the September 11th Victims Compensation Fund carried the burden of determining all of the awards. It is abundantly clear that the Special Master went to great lengths to fairly resolve the issue of a Fund award to a surviving spouse, the person who suffered the greatest loss because she was directly deprived of the economic benefits of the husband. " In the interest of both uniformity and fairness" and, as a matter of public policy, a spouse should receive at least one-half of the economic recovery, as the legal minimum compensation for her remaining years of

dependency, is the policy of the Special Master. The Federal Regulations, interpretative methodologies and policies of the Special Master must be considered by the Supreme Court of United States to avoid a grave injustice.

"In short, Congress has not spoken on the issues addressed by the challenged regulations, as the Special Master has adopted a permissible interpretation of the Act that is entitled to deference". *Schneider v. Feinberg*, 345, F. 3d 135, 145 (2d cir. 2003). All surviving spouses should receive at least one-half of the economic award for the September 11th Victims Compensation Fund. 28 C.F.R. § 104.43 [66 FR 66282, Dec. 21, 2001, as amended at 67 FR 11246, March 13, 2002].

CONCLUSION

I respectfully request that the Supreme Court of the United States of America act in partnership with the Special Master of the September 11th Victim Compensation Fund, Kenneth Feinberg, Esq. to provide equal justice to all surviving spouses of the September 11th tragedy.

In Mr. Feinberg's own words, "What I am asked all the time is what were the most difficult aspects of administering the Fund? I conducted personally over 900 hearings with these families, and the anguish and terror and tragedy were overbearing". Feinberg, K. G., "Negotiating the Victims Compensation Fund": Mass Tort Resolution Without Litigation" 19 Washington University Journal of Law and Policy 21 at 25 (2005).

Congress gave the Special Master the legal authority to support the September 11th surviving spouses through their grief and heartaches. In his own words "...there is law that has been tested to see who takes the money. That is what we did ... half to the [surviving] spouse and the other half to the children". Feinberg, K. G., "Negotiating the Victims Compensation Fund": Mass Tort Resolution Without Litigation" 19 Washington University Journal of Law and Policy 21 at 25 (2005).

For the foregoing reasons the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Stevan J. Schoen, Esq.
Attorney at Law
Counsel for Petitioner,
Rebecca Marchand, Individually and as the
Personal Representative of the Estate
Alfred G. Marchand, Deceased
4 Hillside Drive
Placitas, N.M. 87043
(505) 867-2802

Appendix A

Caution: These electronic slip opinions may contain computer-generated errors or other deviations from the official opinion. Moreover, a slip opinion is replaced within a few months when it is formally released by the Clerk of the Supreme Court for publication. In case of discrepancies between a slip opinion and the opinion published on the Supreme Court web site, www.supremecourt.nm.org under "Current Year Opinions", the opinion posted under the "Current Year Opinions" link controls. The "Current Year Opinions" is regularly updated to include all revisions.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number:

Filing Date: October 14, 2008

NO. 30,608

JOSHUA MARCHAND,
Petitioner-Petitioner,

v.

REBECCA L. MARCHAND, individually and as personal representative of the Estate of ALFRED G. MARCHAND,
Respondent-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Frank K. Wilson, District Judge

Steven K. Sanders & Associates, L.L.C.
Steven K. Sanders
Albuquerque, NM
for Petitioner

Stevan J. Schoen
Placitas, NM
for Respondent

OPINION

BOSSON, Justice.{1}Alfred G. Marchand (Alfred) was a flight attendant on United Airlines Flight 175, one of the two airplanes that terrorists caused to crash into the World Trade Center in New York City on September 11, 2001. He was the sole New Mexico resident to die in the tragic events of that day. Alfred died intestate, survived by his wife Rebecca Marchand (Rebecca), his adult son by a previous marriage Joshua Marchand (Joshua), and his dependent stepson Trae Hale (Trae), Rebecca's son by a previous marriage. Rebecca filed for probate of Alfred's estate (the Estate) in September of 2001 and was appointed Personal Representative. The probate of the Estate was closed, and Rebecca discharged as Personal Representative, on December 5, 2003. Joshua received a distribution from the Estate in the amount of $16,553.25, along with a 1989 Chevy Blazer and other personal property. The remainder of the Estate was distributed to Rebecca as Alfred's surviving spouse.

{2} Rebecca applied to the September 11th Victim Compensation Fund ("the Fund") for victim's relief and federal aid on November 28, 2003. The dispute

in question involves the proper distribution of the award from that Fund. Before we discuss the specific award in this case, we first set forth a brief background of the Fund and the federal legislation that created it.

September 11th Victim Compensation Fund

{3} The Fund was created as part of the Air Transportation Safety and System Stabilization Act (Air Stabilization Act), 49 U.S.C. § 40101 (2001), enacted by Congress to provide compensation for those injured or killed in the terrorist attacks of September 11, 2001. Individual claimants were afforded an opportunity to receive an award from the Fund, thereby waiving their right to file civil actions for damages related to the events of September 11, 2001, except to recover collateral source obligations, such as insurance, or to pursue actions against the terrorists responsible for the attacks. Air Stabilization Act, 115 Stat. 240 § 405(c)(3)(B)(i) (2001).

{4} In the case of a person who was killed in the attacks, the Air Stabilization Act designated the Personal Representative of the Estate as the sole eligible claimant. 28 C.F.R. §§ 104.2(a)(2)-(3), 104.4 (2008). After appointment as Personal Representative by a court of competent jurisdiction, the claimant had to provide written notice of the claim to beneficiaries and interested parties to the Estate. 28 C.F.R. § 104.4(b). Upon receipt of a Fund award, and absent an agreed upon distribution plan between the beneficiaries of the award, the Personal Representative was legally obligated to distribute the award according to the law of the decedent's

domicile or any applicable state court rulings. 28 C.F.R. § 104.52 (2008).

{5} A Special Master appointed by the United States Attorney General oversaw the implementation of the Fund and determined the amounts to be awarded to claimants based upon the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant. Air Stabilization Act, 115 Stat. 237-38 § 404(a) (2001); § 405 (b)(1)(B)(i)-(ii). Fund awards included damages for both economic and non-economic losses. Id., 115 Stat. 238 § 405(b)(1)(B)(i).

{6} Economic loss, defined as "any pecuniary loss resulting from harm," id. § 402(5), was calculated through a methodology that took into account anticipated lost benefits such as income and earnings. 28 C.F.R. § 104.43(a) (2008). Non-economic damages were defined as "losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium . . . and all other nonpecuniary losses of any kind or nature." Air Stabilization Act, 115 Stat. 237 § 402(7) (2001). Because of the inherent difficulty in determining non-economic losses for individual claimants, the regulations designated uniform non-economic loss awards of $250,000 for the Estate of the decedent and $100,000 for the spouse and each dependent of the victim. 67 Fed. Reg. 11,233, 11,239 (Mar. 13, 2002); 28 C.F.R. § 104.44 (2008). The Special Master could deviate from such "presumed" non-economic loss amounts in extraordinary circumstances. 28 C.F.R. §§ 104.31(b)(2), 104.33(f)(2) (2008).

{7} The Fund was remarkable for its efforts to guarantee substantial compensation, as opposed to just minimal assistance, for victims of the September 11th attacks. See generally Kenneth S. Abraham & Kyle D. Logue, The Genie and the Bottle: Collateral Sources Under the September 11th Victim Compensation Fund, 53 De Paul L. Rev. 591, 594 (Winter 2003). However, there was also a concern to avoid over-compensation. See id. at 597-98. Important to this appeal, Congress required the Special Master to reduce a claimant's total award "by the amount of the collateral source compensation the claimant has received or is entitled to receive." Air Stabilization Act, 115 Stat. 239 § 405(b)(6). Collateral source compensation included life insurance proceeds, pension funds, and other death benefits programs. 28 C.F.R. § 104.47(a) (2008).

{8} After the Special Master determined the amount to be awarded on a given claim, he would send a letter to the Personal Representative detailing the final award determination. The letter broke down the various components of the award, specified the collateral offsets and beneficiaries to whom those offsets were attributable, and provided other information to guide the Personal Representative in distributing the award according to the law of the decedent's domicile. 28 C.F.R. § 104.52. The Special Master's award determinations were final and not subject to judicial review. Air Stabilization Act, 115 Stat. 238-39 § 405(b)(3).

Claim on Behalf of Alfred G. Marchand

{9} Rebecca filed a timely claim with the Fund as the Personal Representative of the Estate. Her efforts in pursuing the award included retaining a

New York law firm, traveling to New York City for testimony, and preparing an economic loss analysis of Alfred's anticipated income. Joshua did not participate in filing the claim with the Fund, nor was he required to. Rebecca submitted a list of all individuals entitled to a Fund award and agreed to distribute any award according to New Mexico law. Though Rebecca submitted a proposed distribution plan for the award, there is no indication in the record that the Special Master ever approved that plan.

{10} The Special Master detailed the final award determination in a letter to Rebecca dated June 24, 2004. The total award before collateral source offsets was $1,847,969.88, comprised of an economic loss component of $1,397,969.88, and non-economic loss awards of $100,000 each for Rebecca and Trae, as spouse and dependent child of the decedent, and $250,000 for the Estate. The letter specified the relevant state law that should govern distribution of each portion of the award. The economic loss portion of the award was to be distributed according to New Mexico wrongful death law; the non-economic loss award to the Estate was to be distributed according to New Mexico intestate law, there being no will of record. The non-economic loss awards to Rebecca and Trae were to go directly to them.

{11} However, the Estate did not actually receive $1,847,969.88. Instead, the Estate received a final award of $769,971.88, reflecting a deduction of $1,077,998 in collateral offsets mandated by the Act, due primarily to pension benefits paid directly to Rebecca for her own use. The Special Master's letter broke down the amount of collateral offsets

attributed to each individual: $1,012,321 was attributable to the benefits received by Rebecca, $25,000 to the Estate, $23,177 to Trae, and $17,500 to Joshua. The letter also instructed as follows: "Generally, collateral offsets should first be applied to the share of the individual who received the benefit. Any excess benefit should be applied to the remaining shares of the award." The proper distribution of the $769,971.88 actually received by the Estate is the subject of this appeal.

Lower Court Proceedings

{12} On July 27, 2004, Rebecca filed a motion for subsequent administration in the probate court seeking reappointment as Personal Representative for the purpose of distributing the Fund award. Joshua moved for a temporary injunction on July 19, 2004, to prevent Rebecca from distributing the Fund award. Subsequently, both parties stipulated to removing the probate proceedings to district court and to depositing any Fund payments into the court's registry pending the outcome of the litigation. Both Joshua and Rebecca then moved for summary judgment.

{13} Before the district court, Joshua argued that Rebecca as Personal Representative was obligated to distribute the Fund award according to New Mexico law and as directed by the Special Master's letter. The letter specified that the economic loss portion of the award should be distributed according to New Mexico wrongful death law, while the state's non-economic loss award should be distributed according to New Mexico's intestacy statutes.

{14} Under the New Mexico wrongful death law, one-half of a wrongful death award goes to the surviving spouse, and the other half goes to the surviving children. NMSA 1978, § 41-2-3(B) (1939, as amended through 2001). Under New Mexico intestacy statutes, the surviving spouse receives one quarter of the decedent's separate property, and surviving children receive the remaining three quarters. NMSA 1978, § 45-2-102 (1975). Thus, Joshua argued that he was entitled to half of the total economic loss award prior to collateral offsets, plus three-fourths of the non-economic loss awards to the Estate, Rebecca, and Trae.

{15} Rebecca responded that under federal law, the Special Master's award determination was final and not subject to review. She contended that the economic loss portion of the award was community property, and thus should pass entirely to her as the surviving spouse. She also argued that the $100,000 non-economic loss awards to her and Trae were statutory awards designated for spouses and dependents and were not subject to distribution under intestacy law.

Therefore, she reasoned that Joshua was only entitled to $112,000, representing one-half of the non-economic loss award to the Estate after subtracting the $25,000 in collateral offsets allocated to the Estate. Because Joshua had failed to file a claim directly with the Fund or object to the Special Master's allocation of the award, Rebecca argued that Joshua could not "seek to avoid or rearrange the determination of the Special Master."

{16} The district court granted summary judgment in favor of Rebecca, holding that (1) the Special Master's determination of collateral offsets served only to reduce the amount of the total award, and each individual's share of the award should not be reduced by the amount of collateral benefits attributed to that individual; (2) the $100,000 non-economic loss awards to Rebecca and Trae were part of the Special Master's final award determination and not subject to review; (3) the non-economic loss award of $250,000 to the Estate, allocated according to New Mexico intestacy law, was to be divided between Joshua (3/4 as surviving child, $187,500) and Rebecca (1/4 as surviving spouse, $62,500); and (4) the remaining $319,971.88 ($769,971.88 - $450,000), as economic loss, was community property and passed entirely to Rebecca. Joshua appealed from this ruling.

{17} The Court of Appeals reversed in part, holding that the district court erred in classifying the economic loss award ($319,971.88) as community property that passed to Rebecca. Instead, the Court of Appeals held that the economic loss award should be distributed according to New Mexico's wrongful death statute as directed by the Special Master in his June 24, 2004 letter. Marchand v. Marchand, 2007-NMCA-138, ¶ 24, 142 N.M. 795, 171 P.3d 309. Under the wrongful death statute, Section 41-2-3(B), Rebecca and Joshua would each be entitled to half the economic loss award without any offset against Rebecca for collateral benefits received by her. Rebecca did not seek review of this holding. The Court of Appeals left undisturbed the other rulings of the district court.

{18} Joshua sought review by this Court, and we granted certiorari to decide whether the collateral benefits assigned to each individual in the Special Master's letter should be applied to offset that individual's portion of the award.

DISCUSSION

Standard of Review

{19} This case requires us to interpret the Special Master's letter, the relevant federal statutes and regulations, and New Mexico law to determine the proper distribution of the Fund award among Alfred's beneficiaries. These are matters of law that are subject to de novo review. Unfortunately, due to the unique circumstances that gave rise to the Fund, there is little if any law on point to guide us in our decision.

Collateral Offsets

{20} Joshua argues that the Court of Appeals did not comply with the Special Master's directive that collateral offsets be applied to the share of the individual who received the benefit. According to Joshua, this directive requires that individual shares of the award received by Rebecca and Trae be reduced by the amount of collateral benefits assigned to them in the Special Master's letter. Essentially, Joshua's position is that it would be unfair for Rebecca to receive any of the Fund award when she has already received over $1million in collateral benefits which, in turn, served to reduce the global award, lessening the amount left for distribution to Joshua and all other beneficiaries. Thus, Joshua argues that the collateral benefits received by Rebecca and Trae should be deducted from their

individual portions of the final award and added to his award to bring it closer to the amount he would have received if not for those collateral benefits given to Rebecca and Trae.

{21} The calculations under Joshua's argument would lead to the following result. Rebecca's share of the award, prior to offsetting for collateral benefits, would equal (a) $100,000 non-economic loss award as Alfred's spouse, (b) one-quarter of the $250,000 non-economic loss award to the Estate ($62,500), as directed by the New Mexico intestacy statutes, and (c) one-half of the total economic loss award (prior to subtracting collateral offsets) of $1,397,969.88, or $698,984.94, as directed under the New Mexico wrongful death statutes. When these amounts are added together, Rebecca's share would come to $861,484.94. But Rebecca has already received $1,012,321.00 in collateral benefits, and therefore when one is offset against the other Rebecca would not be entitled to anything at all from the Fund award. Joshua does not argue that Rebecca actually owes him money, only that she should not receive any money from the Fund so long as the collateral benefits assigned to her outweigh her designated share of the award.

Close Turning to Trae's share of the award, $100,000 in non-economic loss as a dependent of Alfred, Joshua would offset Trae's collateral benefits ($23,177) and reduce Trae's share to $76,823. When Trae's $76,823 is subtracted from the final award of $769,971.88, Joshua would receive the balance or $693,148.88.

{22} Rebecca argues that the collateral offsets are only applied initially by the Special Master to reduce the gross award, but should not be applied to reduce individual allocations from the total award. Thus, she argues that the $769,971.88 actually received from the Special Master already takes into account the collateral benefits, and the final award should simply be divided as is, without accounting for each beneficiary's collateral offsets. The calculations under Rebecca's argument would be as follows. The Special Master awarded a total amount of $1,847,969.88 and then reduced that amount by the total amount of collateral benefits received by all the beneficiaries to reach a final award amount of $769,971.88. This final amount would then be distributed under state law as directed by the Special Master's letter. Rebecca and Trae would each get $100,000. The $250,000 in non-economic loss would be distributed according to New Mexico intestacy law—one-quarter, or $62,500, to Rebecca and three-quarters, or $187,500, to Joshua. Finally, the remaining $319,971.88 would be divided equally between Rebecca and Joshua pursuant to wrongful death law, each receiving $159,985.94. Thus, Trae's total share of the Fund award would be $100,000; Joshua's would be $347,485.94; and Rebecca's would be $322,485.94. This is also the result counseled by the Court of Appeals.

{23} Both Rebecca and the Court of Appeals construe Joshua's argument as advocating an impermissible "reallocation" of what the Special Master has already calculated which would be contrary to federal law. We disagree. See Marchand, 2007-NMCA-138, ¶ 27. It is true that the Special Master's calculations are final. But Joshua does not

claim that the Special Master incorrectly calculated the amount of collateral benefits attributable to each beneficiary. Rather, Joshua contends that the amount of collateral benefits assigned to each beneficiary should be applied against that individual's share of the award, thereby offsetting each person's share in proportion to the collateral benefits that person has already received. We read the Special Master's letter as directing the application of those offsets to the individual shares, and to that extent we agree with Joshua. However, as we discuss later, we do not agree with Joshua that the offsets apply to all components of the award.

Application of Collateral Offsets Generally

{24} It is true, as Rebecca argues, that the Act and accompanying regulations do not expressly require that an individual's share of a Fund award must be reduced by the amount of collateral benefits that individual received. However, the Air Stabilization Act gives the Special Master power to administer the Fund and determine the amounts to be awarded to individual claimants. Further, the Special Master was authorized to "provide such other information as appropriate to provide adequate guidance for a court of competent jurisdiction." 28 C.F.R. § 104.33(g). In this case, the Special Master's letter to Rebecca instructs that "[g]enerally, collateral offsets should first be applied to the share of the individual who received the benefit." The Court of Appeals concluded that this language was without any legal effect, included solely to provide information regarding the origin and calculation of collateral offsets.

{25} We disagree that the Special Master's language has no effect on the award distributions. A plain reading of this language indicates a directive to the Personal Representative to be followed in calculating the appropriate distribution of the remaining award among the beneficiaries. We also note that the Special Master's letter provided a breakdown of collateral offsets, showing the amount of collateral benefits attributable to each individual beneficiary—$1,012,321 to Rebecca, $25,000 to the Estate, $23,177 to Trae, and $17,500 to Joshua. This breakdown, taken in conjunction with the language directing that collateral offsets "should first be applied to the share of the individual who received the benefit," persuades us that the Special Master intended that individual collateral offsets should be applied as an offset to individual awards. If that were not the Special Master's intent, there would seem to be no reason to set forth a breakdown of collateral benefits individually, as opposed to just one lump-sum award.

{26} Our interpretation of the Special Master's letter is also supported by general principles of fairness. We observe that if Rebecca had not received $1,012,321 in collateral benefits, and the others had not received collateral benefits in much smaller amounts (a total of $65,677), the final award for economic loss alone would have totaled 1,397,969.88. After distributing this amount according to the wrongful death statute, Section 41-2-3(B), Joshua would have received half, or $698,984.94. Even subtracting Joshua's collateral benefits actually received, he would have been entitled to nearly that amount. However, Rebecca's disproportionate share of collateral benefits to her personally reduced the

total award substantially, and thereby reduced Joshua's share as well to only $159,985.94, being one-half of $319,971.88. Thus, Rebecca's collateral benefits served to reduce Joshua's share of the award by over $500,000.

{27} Under these circumstances, the Special Master's directive embodies a basic notion of fairness. It seeks to avoid excessive compensation for one beneficiary at the expense of the remaining beneficiaries. See, e.g., Strickland v. Roosevelt County Rural Elec. Coop., 103 N.M. 63, 64, 65, 702 P.2d 1008, 1009, 1010 (Ct. App. 1984) (holding that the proceeds of a wrongful death award should be divided into equal shares and each beneficiary should reimburse the compensation carrier from his equal share of the total judgment "the amount of workers compensation benefits received by that beneficiary," and noting that "[t]his makes each beneficiary whole and avoids double recovery by either"). For the purpose of clarity we repeat: Rebecca is not entitled to any of the economic loss component of the award. Joshua is entitled to all of the individual economic loss award.

Collateral Offsets as Applied to the Estate's Non-Economic Loss Award

{28} As for the $250,000 in non-economic losses awarded to the Estate, we apply each individual's collateral offsets to that individual's share. As previously discussed, Joshua is entitled to three-quarters of the Estate's $250,000 non-economic loss award, or $187,500, pursuant to New Mexico intestacy statutes. Section 45-2-102(A)(2). Joshua's collateral benefits of $17,500 reduce his total share to $170,000. Rebecca's collateral benefits of

$1,012,321 entirely eliminate her share of the non-economic loss to the Estate.

Rebecca's and Trae's Non-Economic Loss Awards

{29} While we agree with Joshua that Rebecca's collateral benefits should be offset against her share of the economic loss award, reducing it to zero, we disagree that those offsets apply to Rebecca's personal non-economic loss award. Rebecca's award of $100,000 in non-economic "presumed" damages was a fixed amount set by federal regulation for spouses of deceased victims. 28 C.F.R. § 104.44 ("The presumed non-economic losses for decedents shall be . . . $100,000 for the spouse and each dependent of the deceased victim."). That portion of the award served to compensate Rebecca for her pain and suffering as well as loss of consortium resulting from Alfred's death. See Air Stabilization Act, 115 Stat. 237 § 402(7) (defining "noneconomic losses"). Such damages are personal to Rebecca and do not come at Joshua's expense; they would not have been part of the overall award if Joshua had been the only beneficiary who sought compensation from the Fund. Thus, they do not detract unfairly from what Joshua would have otherwise been entitled to receive if not for Rebecca. The same is true for the $100,000 awarded to Trae as Alfred's dependent. Therefore, we hold that the $100,000 in non-economic losses awarded by the Special Master individually to both Rebecca and Trae (a total of $200,000) is not subject to offset for collateral benefits. Each is entitled to $100,000 from the total award.

Summary of the Award

{30} For the reasons stated, Rebecca and Trae each receive $100,000 not subject to offsets. From the

final Fund award of $769,971.88, that leaves $569,971.88. As previously explained, Rebecca's collateral benefits caused the final award from the Special Master to be reduced dramatically, thereby causing Joshua's share to be substantially smaller. Therefore, the entire balance of the award, or $569,971.88, is awarded to Joshua. Joshua's Claims Against Rebecca for Fraud, Malfeasance, or Accounting

{31} Joshua also appeals the district court's grant of summary judgment on his claims of malfeasance, fraud, and request for accounting. These claims challenge Rebecca's conduct as Personal Representative in connection with the division of Alfred's assets other than the Fund, specifically, certain insurance proceeds and real estate that was Alfred's separate property. The Court of Appeals affirmed the summary judgment, finding that Joshua's allegations were time-barred, and that there was no basis for any claims against Rebecca for fraud, malfeasance, or an accounting, either individually or as personal representative of the estate. Marchand, 2007-NMCA-138, ¶¶ 29-32. We agree with the Court of Appeals and affirm the district court's summary judgment with respect to Joshua's claims of fraud, malfeasance, or accounting.

{32} Rule 12-201(A)(2) NMRA required that Joshua file an appeal within thirty days of the Probate Court's December 5, 2003 Order ("A notice of appeal shall be filed . . . within thirty (30) days after the judgment or order appealed from is filed in the district court clerk's office"). Joshua neither appealed the Order, nor pursued a claim of breach of fiduciary duty within the prescribed statutory

period. Joshua argues that Rebecca's reappointment as Personal Representative for the purposes of administering the Fund award should restart the statute of limitations. We find no merit in this argument. Joshua's claims pertain to issues decided in the original probate proceedings that were resolved in the Order of Complete Settlement and Discharge of Representative. The limitations period for challenging that Order expired prior to the reinstatement of Rebecca as Personal Representative for purposes of distributing the Fund award. We will not start an entirely new limitations period, triggered by the reopening of the probate to address the Fund award, for Joshua to raise claims entirely unrelated to the Fund award—claims that he failed to raise during the limitations period triggered by closure of the original probate proceedings.

{33} We also agree with the Court of Appeals that the record does not support Joshua's contentions that Rebecca improperly or fraudulently took money received from the Fund so as to lift the six-month statute of limitations for pursuing a breach of fiduciary duty claim against a personal representative under NMSA 1978, § 45-3-1005 (1975). We affirm the district court's denial of Joshua's claims for fraud, malfeasance or accounting, and we refer the parties to the opinion of the Court of Appeals for a more thorough discussion of the record as it relates to this issue. See Marchand, 2007-NMCA-138, ¶¶ 31-32.

CONCLUSION

{34} For the foregoing reasons, we reverse the Court of Appeals with respect to the application of collateral offsets. We affirm the Court of Appeals on

all other matters. The case is remanded for proceedings consistent with this opinion.

{35} IT IS SO ORDERED.

RICHARD C. BOSSON,
Justice

WE CONCUR:

EDWARD L. CHÁVEZ, Chief Justice

PATRICIO M. SERNA, Justice

PETRA JIMENEZ MAES, Justice

CHARLES W. DANIELS, Justice

Appendix B

IN SUPREME COURT OF THE
STATE OF NEWMEXICO

December 8, 2008
NO. 30,608

JOSHUA MARCHAND,

Petitioner/Petitioner

vs.

REBECCA L. MARCHAND, individually and as personal representative of the Estate of Alfred G. Marchand,

Respondent/Respondent

ORDER

WHEREAS, THIS MATTER CAME ON FOR CONSIDERATION BY THE Court upon motion for rehearing, memorandum in support, and response thereto, and the Court having considered said pleadings and being sufficiently advised, Chief Justice Edward L. Chavez, Justice Patricio M. Sena, Justice Petra Jimenez Maes, Justice Richard C. Bosson, and Justice Charles W. Daniels concurring;

NOW, THEREFORE, IT IS ORDERED that the motion for rehearing hereby is DENIED.

IT IS SO ORDERED

WITNESS, Honorable Edward L. Chavez, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 8th day of December, 2008

(SEAL)

Kathleen Jo Gibson,
Chief Clerk of
the Supreme Court of the
State of New Mexico

Appendix C

Certiorari Granted, No. 30,608, October 15, 2007

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2007-NMCA-138

Filing Date: June 27, 2007

Docket No. 26,558

JOSHUA MARCHAND,
Petitioner-Appellant,

v.

REBECCA L. MARCHAND, Individually and as Personal Representative of the Estate of Alfred G. Marchand,
Respondent-Appellee.

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY
Frank K. Wilson, District Judge

Steven K. Sanders & Associates, LLC
Steven K. Sanders
Albuquerque, NM
for Appellant

Stevan J. Schoen, LLC
Stevan J. Schoen
Placitas, NM
for Appellee

OPINION

KENNEDY, Judge.

{1} Plaintiff Joshua Marchand (Joshua) appeals from the district court's summary judgment order. Joshua's issues on appeal involve the proper distribution of an award from the September 11th Victim Compensation Fund of 2001 (the Fund), which was awarded after his father, Alfred G. Marchand (Alfred), died on September 11, 2001. The Special Master, appointed by the United States Attorney General to oversee the Fund, determined a final award amount which was to be distributed, in part, to Joshua, to his stepmother, Rebecca Marchand (Rebecca), and to her son Trae Hale (Trae) in accordance with New Mexico intestate succession laws and wrongful death laws. Joshua argues that the district court erred in its distribution of the award from the Fund because the award was not distributed in accordance with New Mexico intestate succession laws and wrongful death laws. Specifically, Joshua is requesting that this Court order that he be awarded the entire economic portion of the Fund awarded by the district court to Rebecca, because after collateral offsets are taken into account, the entire amount is his legal and rightful share of the proceeds.

{2} We affirm the summary judgment order on two of the three issues. We hold that the district court did not err in awarding the two $100,000 non-economic loss awards to Rebecca and Trae. We further hold that the district court did not err in dividing the $250,000 non-economic loss award to the Estate between Joshua and Rebecca, nor did it

err in dismissing the other claims raised against Rebecca for fraud, improper accounting, and malfeasance. However, for the reasons stated below, we hold that the district court erred in awarding the balance of the final award to Rebecca, and we remand for further proceedings on that issue.

FACTUAL AND PROCEDURAL BACKGROUND

{3} Alfred was a flight attendant on United Airlines Flight 175, which crashed into the World Trade Center on September 11, 2001. Alfred was survived by his widow Rebecca, his son, Joshua, and his stepson, Trae. Alfred died intestate, leaving no Last Will and Testament. Alfred's Estate (the Estate) was probated in the Probate Court of Otero County, on the application of Rebecca, who was appointed Personal Representative of the Estate on September 17, 2001. An estate inventory was filed with the Probate Court. A Final Account and Report was also filed with the Probate Court. After a hearing, the probate of the Estate was closed and Rebecca was discharged as Personal Representative by order of the Probate Court on December 5, 2003.

{4} On November 28, 2003, while the Estate was still in probate, Rebecca filed a claim with the Fund as Personal Representative of the Estate, on behalf of herself and all of the heirs and dependents of Alfred. Rebecca also retained a law firm in New York City with expertise in preparation and litigation of compensation claims filed with the Fund. Rebecca personally prepared documents required to process a claim and worked with an economist who prepared the "Economic Loss Award Analysis Utilizing Special Master's Methodology for Mr. Alfred Marchand" as

evidence of Alfred's economic losses. On April 29, 2004, Rebecca traveled to New York to testify at a hearing before the Special Master, who requested evidence to be presented in person to corroborate the documents already in evidence. As part of the claim for compensation in Section IIj of the Fund compensation application, Rebecca was required to submit to the Special Master a plan for distribution of any award received from the Fund. Allegedly, Joshua did not participate in the preparation or presentation of the claim, although Rebecca repeatedly requested that he do so.

{5} The record indicates that although Rebecca submitted a distribution plan during the claims process, the plan was not approved by the Special Master. On June 24, 2004, the Special Master sent a letter to Rebecca notifying her that a final award determination had been made. The letter contained no distribution plan and stated that the award would be paid to Rebecca, as the "Personal Representative, who is legally obligated to distribute the award in accordance with the laws of the decedent's domicile" and that the distribution must be based on "either an agreement of all potential beneficiaries" or at the "direction of a court of competent jurisdiction in accordance with the law of the decedent's domicile." On June 28, 2004, the Special Master sent a second letter to Rebecca providing her with specific information about the $769,971.88 final award described therein and the time for payment of the award.

{6} On July 19, 2004, Joshua filed a Verified Complaint for Temporary Restraining Order, Injunctive Relief, Declaratory Relief, Accounting,

and Damages against Rebecca, both individually and as Personal Representative of the Estate. Joshua alleged that during the probate of the Estate, Rebecca breached her fiduciary duties and took separate property belonging to Alfred prior to their marriage, including a home owned by Alfred, giving no separate property belonging to Alfred to Joshua. He further alleged that Rebecca was about to receive, as the purported Personal Representative of the Estate, an additional payment of $769,971.88 from the Fund, and that Rebecca proposed to take $769,971.88 and distribute only $70,000 to Joshua, retaining the remainder for herself and her son Trae.

{7} Joshua also filed a motion for temporary restraining order on July 19, 2004, arguing that immediate and irreparable injury, loss, or damage would result to Joshua because he just received verbal notice that the funds from the final award would be distributed to Rebecca on July 19, 2004, if Joshua did not agree to a settlement by July 19th and a release of any claims to the Fund award. The district court issued a temporary restraining order on July 19, 2004, ordering Rebecca to be enjoined and restrained from distributing any money from the Fund and it ordered her to deposit the same into the Court registry.

{8} On July 27, 2004, Rebecca responded to Joshua's complaint that she is the surviving widow of Alfred. She further stated that the federal government, pursuant to the Air Transportation Safety and System Stabilization Act (Air Stabilization Act) 49 U.S.C.A. § 40101 (2001), established an administrative process for the determination of claims resulting from the

September 11, 2001, terrorist attack. Rebecca contended that under federal law, approval of the award by the Special Master was final and not subject to judicial review, see Air Stabilization Act § 405(b)(3), 49 U.S.C.A. 40101, and any review of the award is prohibited by federal law. Eventually, the parties stipulated that the probate be removed to the district court, and that any payments received from the Fund be administered by Rebecca as Personal Representative in a supervised administration, and that any payments be held in an interest bearing account.

{9} On July 27, 2004, Rebecca filed a motion for subsequent administration in the probate court, which stated that she was the duly qualified Personal Representative of the Estate until it was settled by the probate court on December 20, 2003. It further stated that other property had been discovered since the settlement of the Estate because the Estate was eligible for a distribution of funds as a final award from the Fund. Therefore, the motion stated that reappointment of Rebecca was necessary for the administration of the subsequently discovered property of the award from the Fund. The probate court granted the motion for subsequent administration.

{10} Litigation ensued, and Joshua moved for summary judgment on May 18, 2005, arguing that there were two issues in the lawsuit: the calculation and distribution of the award from the Fund and misappropriation by Rebecca as Personal Representative of the Estate. He argued that according to the laws of New Mexico, the award of $1,018,984.94 from the Fund should be distributed

to him. Joshua also contended that the misappropriation issue should be decided at trial. Rebecca responded to Joshua's motion for summary judgment stating that the issues raised by the motion for summary judgment have already been adjudicated in favor of Rebecca in a decision rendered on June 28, 2004, by the Special Master.

{11} On July 12, 2005, Rebecca also moved for summary judgment arguing that, with regard to the misappropriation issue, the Estate was closed on December 5, 2004, and no appeal was taken from that order, and Joshua cannot pursue an appeal or new action based on the December 5th order. Rebecca further argued that concerning Joshua's claim that he was entitled to most or all of the award from the Fund, Joshua did not file a claim with the Fund, and therefore received no award from the Fund. Therefore, because Joshua did not file his claim in a timely and proper manner, Rebecca argued that summary judgment should be entered on her behalf, and that Joshua's July 19, 2004, motion for a restraining order on distribution of the Fund award should be dismissed.

{12} Based on the cross-motions for summary judgment, the district court found that no genuine issues of material fact existed and that the case could be decided as a matter of law. The district court also made the following findings: (1) the final award arising out of the claim from the Fund was $769,971.88, (2) the collateral offsets deducted from the total damages by the Special Master to arrive at the final award are not subject to review or reallocation, and (3) the $100,000 non-economic damage awards to Rebecca and Trae as spouse and

dependent child are part of the final award, as directed by the Special Master, and are not subject to review or reallocation by the court. The court held the following: (1) the collateral offsets deducted from the total damages by the Special Master is consistent with the apparent Congressional intent that they be offset against general economic damages; (2) the remaining amount of the final award, $769,971.88, was awarded by the Special Master as economic damages which are community property under NMSA 1978, § 45-2-102 (1975) and pass entirely to Rebecca; (3) the $250,000 general non-economic damage award is part of a final award which was not allocated as directed by the Special Master among the claimants and is separate property of Alfred; and (4) under Section 45-2-102, Joshua is entitled to 3/4 of this amount ($187,500) and Rebecca is entitled to 1/4 of this amount ($62,500). After the calculation of taxes, costs, and attorney fees, the district court ordered that Joshua be awarded $98,750.00 plus a pro-rata share of interest. The district court ordered that all other claims be denied, and all other requests for summary judgment inconsistent with his findings be denied. Joshua appeals from this order. Other additional, pertinent facts will be provided throughout the opinion as needed.

DISCUSSION

1. Standard of Review

{13} A district court's grant of summary judgment is reviewed de novo, and is only appropriate "where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." Self v. United Parcel Serv., Inc., 1998-NMSC-046, ¶

6, 126 N.M. 396, 970 P.2d 582. "[W]e view the facts in a light most favorable to the party opposing the motion [for summary judgment] and draw all reasonable inferences in support of a trial on the merits[.]" Handmaker v. Henney, 1999-NMSC-043, ¶ 18, 128 N.M. 328, 992 P.2d 879.

2. The Creation and Implementation of the Fund

{14} In order to compensate the victims and their families of the September 11, 2001, tragedy, President Bush signed the Air Stabilization Act into law. Kenneth Feinberg, Esq., was appointed as the Special Master charged with the duty of administering the Fund. The rules and regulations of the Fund, codified at 28 C.F.R. § 104 (2002), provide, in part, that by electing to file a claim with the Fund, a claimant waives all rights to bring a civil action regarding the events of September 11th, except to recover collateral source obligations (i.e., life insurance, pension funds) or to sue knowing participants in the hijacking conspiracy. See 28 C.F.R. § 104.61 (explaining the limitations on civil actions). The rules further provide that the claimant must be a victim or the personal representative "of those who were killed as a result of the crashes." See 28 C.F.R. § 104.1. The rules also state that the Special Master shall review submitted claims according to three factors: harm to the claimant, facts of the claim, and the individual circumstances of the claimant. See Air Stabilization Act § 405(b)(1), 49 U.S.C.A. 40101. The Special Master's determination is final and not subject to judicial review. See id. § 405(b)(3).

{15} The Fund provides that only one personal representative shall be appointed for the decedent. See 28 C.F.R. § 104.4. Pursuant to 28 C.F.R. § 104.52, "[t]he Personal Representative shall distribute the award in a manner consistent with the law of the decedent's domicile or any applicable rulings made by a court of competent jurisdiction." Further, the regulations require that the personal representative shall be either the executor or administrator of the decedent's estate, or the first person in the line of succession under the intestacy laws of the decedent's domicile. 28 C.F.R. § 104.4(a)(2).

{16} The regulations further require that before any funds are distributed, the personal representative must submit a distribution plan to the Special Master of the Fund for approval. See 28 C.F.R. § 104.52. The regulations also provide that should the Special Master find that the distribution plan does not adequately compensate individuals provided for in decedent's will or under applicable state intestacy laws, the Special Master may direct the personal representative to distribute funds to "such spouse, children, or other relatives." Id.

{17} The Fund allocated final awards based on economic and non-economic losses to the decedent's estates. According to 28 C.F.R. § 104.43 (providing determinations of presumed economic loss for decedents), Congress determined that the Special Master shall consider sums corresponding to loss of earnings or other benefits related to employment and medical expense loss, replacement services loss, loss due to death/burial costs, and loss of business or employment opportunities. According to the

regulations, "economic loss" means any pecuniary loss resulting from harm (including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable State law. See id.; Air Stabilization Act § 402(7), 49 U.S.C.A. 40101. Additionally, 28 C.F.R. § 104.44 focuses on the determination of presumed non-economic losses for decedents. Non-economic losses means losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation, and all other non-pecuniary losses of any kind or nature. Air Stabilization Act § 402(7), 49 U.S.C.A. 40101. "The presumed non-economic losses for decedents shall be $250,000 plus an additional $100,000 for the spouse and each dependent of the deceased victim." 28 C.F.R. § 104.44. "Such presumed losses include a non-economic component of replacement services loss." Id. Finally, after a final award is determined, Congress contemplated the distribution of the economic and non-economic losses, and 28 C.F.R. § 104.52 controls the distribution of the award to a decedent's beneficiaries. Section 104.52 states that the personal representative shall distribute the award "in a manner consistent with the law of the decedent's domicile or any applicable rulings made by a court of competent jurisdiction." Id

{18} Applying the regulations, along with the laws of the decedent's domicile, in this case, the Special

Master arrived at a final award determination for Rebecca's claim. The wrongful death statute in New Mexico provides for the distribution of proceeds as follows: "[I]f there is a surviving spouse and a child or grandchild, then one-half to the surviving spouse and the remaining one-half to the children and grandchildren, the grandchildren taking by right of representation[.]" NMSA 1978, § 41-2-3(B) (2006). Section 45-2-102(A), New Mexico's intestate succession law, provides as follows:

A. as to separate property:
(1) if there is no surviving issue of the decedent, the entire intestate estate; or
(2) if there is surviving issue of the decedent, one-fourth of the intestate estate; and
B. as to community property, the one-half of the community property as to which the decedent could have exercised the power of testamentary disposition passes to the surviving spouse. The Special Master's letter to Rebecca notifying her that a final award determination had been made noted that awards from the Fund included the three general components discussed above:
1) compensation for economic loss to be generally distributed according to the wrongful death law of the decedent's domicile, 2) $250,000 for non-economic harm distributed in accordance with a will, or if there is no will, the intestate law of the decedent's domicile, and 3) a $100,000 non-economic award for each spouse and/or dependent.

The letter further stated that the Fund must also deduct "collateral sources" from the award, which includes life insurance, pension funds, death benefit payments, and payments by Federal, State, or local

governments related to the terrorist-related aircraft crashes of September 11, 2001. In this case, the aggregate final award was $769,971.88. The final award amount is undisputed.

3. Propriety of this Appeal

{19} As a threshold issue, we address Rebecca's contention that the Special Master's award was based on the approved plan of distribution and therefore the award is final, binding, and not subject to judicial review as set forth in the Air Stabilization Act. Joshua contends that this lawsuit is proper because he is not challenging the Special Master's final award. Rather, he is challenging the distribution of the award. We agree with Joshua's argument, and determine that contrary to Rebecca's contention, the Act does not bar this lawsuit.

{20} Section 405(b)(3) of the Air Stabilization Act provides:

Not later than 120 days after that date on which a claim is filed . . . the Special Master shall complete a review, make a determination, and provide written notice to the claimant, with respect to the matters that were the subject of the claim under review. Such a determination shall be final and not subject to judicial review.

Air Stabilization Act § 405(b)(3), 49 U.S.C.A. 40101. Although Rebecca contends that Section 405(b)(3) bars this lawsuit, Section 405(b)(3) is unavailing to Rebecca under the facts presented. This case involves the determination of the proper distribution of the award under state law, and not the Special

Master's award determination itself. Such a case is expressly anticipated by the Fund's guidelines, and in the language of the Special Master's final award letter to Rebecca. See 28 C.F.R. §§ 104.33(g), 104.52. We note that state courts have exercised jurisdiction in similar matters relating to the Fund. For example, the New York Appellate Division recently affirmed a denial of a motion to dismiss in a dispute over Fund award distribution. See Cruz v. McAneney, 816 N.Y.S.2d 486, 489 (N.Y. App. Div. 2006). As no party has challenged the rules of the Special Master or his calculation of the total award, this appeal is properly before this Court, and we can discuss the distribution of the final award.

4. Distribution of the Fund

{21} With regard to the distribution of the award, we hold that the district court did not err in finding that the $100,000 non-economic damage awards to both Rebecca and Trae were final as directed by the Special Master and not subject to review or reallocation. The Special Master's June 28, 2004, letter to Rebecca directs separate awards of $100,000 to Rebecca as Alfred's spouse and to Trae as Alfred's dependent. This award is expressly contemplated in 28 C.F. R. § 104.44, which directs to a spouse and to each dependent the amount of $100,000 as compensation for presumed non-economic loss of replacement services. Unlike other components of loss, the Fund and its attendant regulations did not provide that the $100,000 non-economic awards would be distributed according to the state law of a decedent's domicile. See id. We therefore affirm the district court's distribution of this component of the final award.

{22} With regard to the $250,000 award for the non-economic loss to the Estate, we hold that the district court did not err in finding that Joshua is entitled to 3/4 of the award ($187,500) and Rebecca is entitled to 1/4 of the award ($62,500). Rebecca agrees that summary judgment was proper as to the $250,000 non-economic damage award, as the award was not specifically allocated as directed by the Special Master. According to 28 C.F. R. § 104.44, the presumed non-economic losses for decedents is $250,000, and the Special Master directed that this award be distributed in accordance with a will, or if there is no will, the intestate law of the decedent's domicile.

{23} In this case, the $250,000 non-economic award is the separate property of the decedent, Alfred. Therefore, pursuant to Section 45-2-102(A), the district court correctly held that as a matter of law, Joshua is entitled to three-fourths of the award and Rebecca is entitled to one-fourth of the award.

{24} Finally, with regard to the economic loss component of the final award, we hold that the district court applied the wrong principle of law when it distributed the economic loss portion of the award ($769,971.88 less $450,000 for the distribution of non-economic loss awards) entirely to Rebecca as her share of community property. The Special Master's June 24, 2004, letter states that the economic loss component is to be generally distributed according to the wrongful death law of the decedent's domicile. In this case, the district court disregarded the explicit instructions of the Special Master and found that the economic award

was community property and did not apply our wrongful death laws when it distributed the entire award to Rebecca. We hold that the economic loss portion of the award should be distributed to both Rebecca and Joshua according to Section 41-2-3(B).

{25} Joshua contends that he is entitled to receive the entire $769,971.88, or perhaps more, because collateral offsets were improperly applied to his share of the final award. Rebecca contends that she should receive the entire economic loss award because she was the only person who suffered economic loss and Joshua was not awarded any of the economic loss award by the Special Master. We are not persuaded by either party's arguments.

{26} With regard to Joshua's contentions, he misconstrues the Special Master's directions that compensation for economic loss is to be generally distributed according to the wrongful death laws of the decedent's domicile and misinterprets the law. First, as stated above, our wrongful death law directs that the economic loss award be split between Rebecca and Joshua. Second, with regard to Joshua's contention that the collateral offsets were improperly applied in this case, we note that Congress bestowed great discretion on the Special Master to determine appropriate offsets, and we cannot say that based on its directives, the Special Master erred in this case. See, e.g., 28 C.F.R. § 104.47(a) (providing that when determining the appropriate collateral offsets the Special Master may employ an appropriate methodology).

{27} The Special Master's final award letter to Rebecca states that "[g]enerally, collateral offsets

should first be applied to the share of the individual who received the benefit." It further states that pursuant to court order or an arrangement by the parties, a reallocation of collateral offsets may be appropriate under certain circumstances. We do not read this language as directing the trial court to reallocate the offsets, but rather the language provides information as to the origin of the offsets and how they were calculated in coming to the final award amount. In this case, the district court found that collateral offsets deducted from the total damages by the Special Master to arrive at the final award are not subject to review or reallocation, and the district court found that the deduction was consistent with the apparent Congressional intent that deductions be offset against general economic damages. Based on the discretion given to the Special Master and the state courts by the federal government, we cannot say that the district court erred as a matter of law with regard to collateral offsets.

{28} With regard to Rebecca's argument that she should receive the entire economic award, we note that she also misconstrues the Special Master's directions that economic losses be generally distributed according to the wrongful death laws. Although Rebecca contends that she is the only claimant that is entitled to the economic loss portion of the final award as set forth in the proposed distribution plan, the parties acknowledge that the Special Master did not approve the distribution plan. Further, to award the economic loss award according to our community property laws would completely ignore the Special Master's directive. As the Special Master's letters to Rebecca indicated that the award

from the Fund remained undistributed and should be distributed according to New Mexico law, we hold that the district court did not apply the appropriate legal principles to the distribution of the economic loss award.

Therefore, we remand this case to the district court to distribute the economic damages to Joshua and Rebecca pursuant to Section 41-2-3(B).

5. Claims Against Rebecca for Fraud, Malfeasance, or Accounting

{29} Joshua raised claims against Rebecca as Personal Representative of the Estate or individually, for fraud, malfeasance, or improper accounting in his July 19, 2004, complaint. In essence, he argued that Rebecca did not follow all of the procedures for eligible claimants of the Fund or the procedures set forth in the New Mexico Probate Code. Although the district court did not make any specific findings regarding Joshua's claims against Rebecca in its summary judgment order, it did order that all the claims be denied. We hold that the district court did not err.

{30} On appeal, Joshua contends that contrary to Rebecca's arguments before the district court, the claims for fraud, misrepresentation, and inadequate disclosure are not barred by the statute of limitations even if any other rights are barred. We are not persuaded by Joshua's arguments. First, the record convinces us that any claim arising from the probate court's December 5, 2003, Order of Complete Settlement and Discharge of the Personal Representative is an untimely and impermissible

collateral attack of a final order. Joshua did not appeal the Order of Complete Settlement within thirty days as provided by our rules of appellate procedure. See Rule 12-201(A)(2) NMRA. Furthermore, Joshua did not pursue a claim for breach of fiduciary duty against Rebecca as Personal Representative with regard to the probated estate before the award from the Fund was distributed, as set forth in NMSA 1978, § 45-3-1005 (1975) (ordinarily providing a six-month statute of limitations after filing the closing statement). Rather, Joshua received full payment of his distribution from the probate estate on January 13, 2003. Cf. Courtney v. Nathanson, 112 N.M. 524, 525, 817 P.2d 258, 259 (Ct. App. 1991) ("The general rule is that a party waives her right to appeal when she accepts the benefit of a judgment."). Joshua also received an accounting showing the calculation for distribution of the Estate. Moreover, Rebecca was duly appointed Personal Representative of the Estate, and Joshua did not contest the appointment.

{31} To the extent that Joshua contends that Rebecca improperly or fraudulently took money received from the Fund, which, if proven, would lift the six-month statute of limitations under Section 45-3-1005, this contention is not supported by the record. The record reveals that only one claimant was permitted to file a claim for compensation from the Fund. Rebecca filed a claim and gave notice to all heirs and potential beneficiaries of Alfred's estate. Joshua was notified of the claim and was asked to participate in the prosecution of the claim. For whatever reasons, Joshua chose not to participate in or contest the claim before the Special Master.

{32} The record further reflects that after payment from the Fund was received by Rebecca, she and Joshua agreed by stipulated order to keep the award in an interest-bearing bank account until further order of the district court and upon resolution of this appeal. There is no evidence in the record, nor does Joshua allege, that any money received from the Fund was improperly or fraudulently misappropriated by Rebecca or that there has been inadequate disclosure or misrepresentation with regard to payments from the Fund.

Therefore, as there is no basis for any claims against Rebecca either individually or as Personal Representative of the Estate, we hold that the district court did not err in denying all claims against Rebecca for fraud, malfeasance, or accounting.

CONCLUSION

{33} For the foregoing reasons, we affirm the district court's distribution of the Fund with regard to all of the non-economic damage awards. We reverse the district court's distribution of the economic damage award to Rebecca, and remand to the district court so that it can distribute the award according to New Mexico wrongful death law. We affirm the district court's denial of all claims against Rebecca for fraud, malfeasance, or accounting.

{34} IT IS SO ORDERED.

_____

RODERICK T. KENNEDY, Judge

WE CONCUR:

CELIA FOY CASTILLO, Judge

MICHAEL E. VIGIL, Judge

Appendix D

IN THE TWELFTH JUDICIAL DISTRICT COURT
COUNTY OF OTERO
IN THE STATE OF NEW MEXICO

JOSHUA MARCHAND,
Petitioner,

Vs. NO. CV-04-356
Division IV

REBECCA L. MARCHAND, Individually
And as Personal Representative of the Estate
Of Alfred G. Marchand,
Respondent.

SUMMARY JUDGMENT

This matter having come before the Court on the Motion for Summary Judgment filed by Joshua L. Marchand and the Motion for Summary Judgment filed by Rebecca L. Marchand, and the Court having reviewed the record, together with the exhibits submitted by the parties, and having considered the Memorandum of Law submitted by each of the parties, and the Court being otherwise fully advised in the premises FINDS THAT there are no genuine issues of material fact, and the case can be decided as a matter of law and the Court further FINDS THAT:

1. This Court has jurisdiction of the parties and the subject matter. Neither the filing of the Federal Court lawsuit nor the earlier closing of the Probate Court action limits this Court's jurisdiction in any way.

2. The Court finds that there is no genuine issue of material fact that the "final award" arising out of this claim upon the September 11th Victims Compensation Fund is $769,971.88.

3. The Court finds that the "collateral offsets" deducted from the total damages by the Special Master to arrive at the "final award" are not subject to review or re-allocation by this Court except that the Court holds that it is consistent with the apparent Congressional intent that they be offset against general economic damages.

4. The Court finds that the $100,000, non-economic damage award to the surviving spouse, Rebecca L. Marchand, is a part of the "final award" and was awarded "as directed by the Special Master" and is not subject to review or re-allocation by this Court.

5. The Court finds that the $100,000, non-economic damaged award to the dependent child Trae Hale is a part of the "final award" and was awarded "as directed by the Special Master" and is not subject to review or re-allocation by this Court.

6. The Court holds that the remaining amount of the "final award" ($769,971.88 -$450,000 =$319,971.88) was awarded by the Special Master as economic damages which are community property under Section 45-2-102, NMSA, and pass to the surviving spouse.

7. The Court holds that the $250,000, general non-economic damage award is a part of the "final award" which was not allocated "as directed by the Special Master" among the claimants and it is separate property of the Decedent. Under Section 45-2-102, NMSA, Plaintiff, surviving child, is entitled to ¾ of this amount ($187,500) and

Defendant surviving spouse is entitled to ¼ ($62,500) of this amount.

8. The Court finds that Joshua L. Marchand has already been paid the sum of $70,000.00 from the general non-economic damage award by Rebecca L. Marchand, as the Personal Representative of the Estate of Alfred G. Marchand, Deceased, in advance of the ruling by this Court.

9. The Court finds that the "final award" was reduced by ten per cent (10%) for fees and costs paid to the law firm of Kreindler and Kreindler, New York, which law firm prosecuted the administrative law claim on behalf of all of the parties hereto, leading to the final award from the Special Master of the September 11th Victims Compensation Fund.

10. The portion of attorneys fees and costs incurred in the prosecution of the administration law claim before the Special Master of the September 11th Victims Compensation Fund are to be shared by all of the parties on a pro-rata basis. Therefore, the share of the general non-economic damage award to be awarded to Joshua L. Marchand shall be reduced by the sum of $18,750.00 as his share of the fees and costs incurred in obtaining the "final award". ($187,500.00 x 10% = $18,750.00).

11. The total claim of Joshua L. Marchand, as surviving child, has been calculated to be $187,000.00; less fees and costs of $18,750.00, and less $70,000.00, already paid to him, for a net total distribution due Joshua L. Marchand in the sum of $98,750.00, plus his pro-rata share of the interest in the fund that the proceeds have been invested in since receipt by the Personal Representative.

IT IS ORDERED, ADJUDGED AND DECREED that Joshua Marchand, be and he hereby

is awarded judgment in the sum of NINETY-EIGHT THOUSAND SEVEN HUNDRED AND FIFTY DOLLARS ($98,750.00) plus a pro-rata share of the interest earned in the Personal Representative interest bearing account, plus costs of Court, against Rebecca L. Marchand as Personal Representative of the Estate of Alfred G. Marchand, Deceased to be disbursed to Joshua L. Marchand by the Personal Representative.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pursuant to stipulation of the parties, all funds in the interest bearing account administered by the Personal Representative of the Estate of Alfred G. Marchand, Deceased be held by Rebecca L. Marchand as the Personal Representative of the Estate of Alfred G. Marchand in an interest bearing account pending further Order of the Court

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all other claims are denied, and all other requests for Summary Judgment inconsistent herewith are denied.

_____

THE HONORABLE FRANK K. WILSON
District Court Judge

Submitted by:

STEVAN J. SCHOEN, LLC

_____

Stevan J. Schoen, Esq.
Attorney for Rebecca L. Marchand

Approved as to form by:

_____

Steven K. Sanders, Esq.
Attorney for Joshua Marchand

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No. 08-1124

FILED
APR 6 - 2009
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SUPREME COURT, U.S.

In The

Supreme Court of the United States

REBECCA L. MARCHAND,
Individually and as Personal
Representative of the Estate of Alfred G. Marchand,

Petitioner,

vs.

JOSHUA MARCHAND,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of The State Of New Mexico

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEVEN K. SANDERS
STEVEN K. SANDERS & ASSOCIATES, LLC
820 Second Street, NW
Albuquerque, New Mexico 87102
Telephone (505) 243-7170

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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Point II. The arguments and authorities presented in support of the Petition were not raised in the trial court, the New Mexico Court of Appeals nor even in the New Mexico Supreme Court. As a result, Petitioner did not comply with Supreme Court Rule 14.1(g)(i) because she could not specify, "the stage in the proceedings, both in the court of first instance and in the appellate courts when the federal questions sought to be reviewed were raised; . . . ". It was not until the Motion for Rehearing filed in October, 2008 that Petitioner cited the Special Master's "Final Report" and claimed that it supported or conflicted with the decision of any Court and required that Petitioner receive one-half of the economic award. Hence certiorari should be denied 7

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Comes now the Respondent, Joshua Marchand, and submits this Opposition to the Petition for Writ of Certiorari:

REASONS FOR DENYING THE WRIT

I. Introduction.

This case involves the distribution **under New Mexico law** of a cash award made by the Special Master of the September 11th Fund to the New Mexico Personal Representative of the Estate of Alfred Marchand, a New Mexico resident, who died September 11, 2001 at the World Trade Center. The Special Master's Award required that the money be distributed in accordance with the law of the decedent's domicile:

> **This award will be paid to the Personal Representative who is legally obligated to distribute the award in accordance with the laws of the decedent's domicile.** The distribution must be based on either an agreement of all potential beneficiaries (if capable of consenting under applicable state law) **or at the direction of a court of competent jurisdiction in**

> **accordance with the law of the decedent's domicile.**" (Record Proper, "RP" 187, App. 1).[1]

Since the issues before the courts of New Mexico involved the interpretation of New Mexico law, i.e., "the law of the decedent's domicile," and since the distribution was made "at the direction of a court of competent jurisdiction in accordance with the law of the decedent's domicile," the Petition should be denied because the Petition raises state, not federal issues.

The Petition should be denied because there is no Federal Question or if there is, it is insubstantial and

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[1] The Award letter follows the requirements of the Federal Regulations. See 28 C.F.R. §104.52:

> **Distribution of award to decedent's beneficiaries.**
>
> **The Personal Representative shall distribute the award in a manner consistent with the law of the decedent's domicile or any applicable rulings made by a court of competent jurisdiction.** The Personal Representative shall, before payment is authorized, provide to the Special Master a plan for distribution of any award received from the Fund. Notwithstanding any other provision of these regulations or any other provision of state law, in the event that the Special Master concludes that the Personal Representative's plan for distribution does not appropriately compensate the victim's spouse, children, or other relatives, the Special Master may direct the Personal Representative to distribute all or part of the award to such spouse, children, or other relatives.

certainly of no national interest;[2] second, Petitioner failed to timely raise and thus properly preserve in the New Mexico Courts the issues she raises herein and she consequently could not comply with this Court's rules showing where or when the matters were raised; third, the claim that the Special Master's Final Report conflicts with the decision of the New Mexico Supreme Court is erroneous.

ARGUMENT

Point I. The New Mexico Supreme Court did not decide an important question of federal law because the Court distributed the economic award in accordance with the wrongful death law of the decedent's domicile, New Mexico. Hence certiorari should be denied.

Petitioner complains about the New Mexico Supreme Court's application of its wrongful death law,[3] including collateral source rules, to the

---

[2] Petitioner admits this is the only case in the United States to adjudicate a distribution. (Petition, p. 30)

[3] The Award reads "Awards from the Fund include three general components: **1) compensation for economic loss to be generally distributed according to the wrongful death law of the decedent's domicile**, 2) $250,000 for non-economic harm distributed in accordance with a will, or if there is no will, the intestate law of the decedent's domicile, and 3) a $100,000 non-economic award for each spouse and/or dependent. The Fund must also deduct "collateral sources" from the award, which includes life insurance, pension funds, death benefit

(Continued on following page)

determination of the amount of the economic loss distribution to herself and Joshua Marchand, the son of the deceased.

This is not a "Federal Question," much less an "important question of federal law that has not been, but should be, settled by this Court . . . ." (Supreme Court Rule 10(c)). The unanimous New Mexico Supreme Court properly acted to distribute the award in accordance with the terms of the Special Master's Award and federal regulations, both of which required that the award be distributed, "in a manner consistent with the law of the decedent's domicile."[4]

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payments, and payments by Federal, State, or local governments related to the terrorist-related aircraft crashes of September 11, 2001." (RP 240)

[4] See 28 C.F.R. §**104.52**. "The Personal Representative shall distribute the award **in a manner consistent with the law of the decedent's domicile** or any applicable rulings made by a court of competent jurisdiction . . . ."

> The Special Master reiterated this requirement in his Award of June 24, 2004 to Rebecca Marchand stating: **This award will be paid to the Personal Representative who is legally obligated to distribute the award in accordance with the laws of the decedent's domicile.** The distribution must be based on either an agreement of all potential beneficiaries (if capable of consenting under applicable state law) **or at the direction of a court of competent jurisdiction in accordance with the law of the decedent's domicile . . . Generally, collateral offsets should first be applied to the share of the individual who received the benefit. Any excess benefit should be applied to the remaining shares of the award. However, pursuant to an**

(Continued on following page)

Neither interpretation of New Mexico law nor even the Award, even if erroneous, is an "important federal question."

As stated at 23 Moore's *Federal Practice 3D* §510.41[3], "The importance of an issue is not necessarily measured by its impact on the litigants, but its contribution to the development of national law . . . ." In the instant action, there is no impact of the New Mexico Supreme Court's decision on national law because the Fund no longer exists.

This Court explained in *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 74, 75 S. Ct. 614, 616 (1955) that, "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants." In the case at bar, there is no national interest in the outcome of this case, only the litigants' interests.

According to 23 Moore's *Federal Practice 3D* §510.04, the Courts' jurisdiction over appeals from a state court decision is limited to those cases in which "a **substantial** federal question was **duly raised** and **adjudicated** and the judgment does not rest on adequate nonfederal grounds."

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agreement of the parties or court order, a reallocation of collateral offsets may be appropriate under the circumstances." (App. 1-2 and 4)

In the instant action, no substantial federal question was duly raised or adjudicated. Hence, this Court does not have jurisdiction. The only argument that a federal question was raised is that since the Special Master was appointed pursuant to federal law, his decision raises an important question of federal law.

But the Special Master's award and the regulations that control the distribution of the proceeds of the award state that, "The Personal Representative shall distribute the award in a manner consistent with **the law of the decedent's domicile or any applicable rulings made by a court of competent jurisdiction** . . . ."[5] That is not a federal issue.

Additionally, the award's distribution is pursuant to an "applicable ruling made by a court of competent jurisdiction." Again, not an important federal issue and hence the Petition should be denied.

---

[5] 28 C.F.R. §104.52.

Point II. The arguments and authorities presented in support of the Petition were not raised in the trial court, the New Mexico Court of Appeals nor even in the New Mexico Supreme Court. As a result, Petitioner did not comply with Supreme Court Rule 14.1(g)(i) because she could not specify, "the stage in the proceedings, both in the court of first instance and in the appellate courts when the federal questions sought to be reviewed were raised; . . . ." It was not until the Motion for Rehearing filed in October, 2008 that Petitioner cited the Special Master's "Final Report" and claimed that it supported or conflicted with the decision of any Court and required that Petitioner receive one-half of the economic award. Hence certiorari should be denied.

In 23 Moore's *Federal Practice 3D* §510.41[3][e][ii] it is stated: "As a rule, the Court will not grant certiorari to decide an issue that was not raised in the proceedings below – irrespective of its general significance or novelty . . . ."

No argument or authority cited in the Petition was raised in the trial court, the New Mexico Court of Appeals or even the Supreme Court of New Mexico until the Motion for Rehearing was filed in the New Mexico Supreme Court and then the only authority mentioned was the Final Report. At that stage, whatever issue the Final Report may create was not timely raised. Because Petitioner failed to timely and

properly raise a "Federal Question," this Court should deny the Petition.

Petitioners' argument as set out in her Questions Presented[6] claims a "conflict in legal authority" between the New Mexico Supreme Court's decision and the Special Master's "Final Report." However, this argument was not timely raised in the lower courts.[7] The so-called "Chevron deference" argument was never raised by Petitioner at any time prior to

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[6] " . . . Whether the conflict in legal authority between **the Final Report of the Special Master of the September 11th Victims Compensation Fund of 2001** containing the record of his consistent administrative law decisions based upon federal regulations and his administrative law policy and precedent that *no surviving spouse is to receive less then one-half of the award for economic loss,* and whose authority was confirmed in *Schneider v. Feinberg,* 345 F.3d 135 (2nd Cir. 2003) should be given *Chevron* deference to uphold the rulings of the Special Master of the September 11th Victims Compensation Fund; thereby, reversing the New Mexico Supreme Court's decision in *Marchand v. Marchand,* 2008-NMSC-065, 199 P.3d 281 (N.M. 2008) which eliminated the Fund award to the surviving spouse." (Pet., p. i.)

[7] Petitioner disingenuously claims that the New Mexico Supreme Court ignored the Final Report. See Petition, p. 11, "Somehow the New Mexico high court ignored the Final Report of the Special Master and all other sources which confirmed that no surviving spouse should be awarded less than one-half (1/2) of the economic loss portion of the September 11th Victim Compensation Fund Award. See U.S. Department of Justice, Kenneth R. Feinberg, Esq., Special Master "*Final Report of the Special Master for the September 11th Victim Compensation Fund of 2001*, Vol. 1 (2004) ('Final Report')." **Petitioner never claimed the Report as legal authority** until she filed her Petition for Rehearing in October, 2008.

the instant Petition and is simply an attempt to create an important federal question.

Furthermore, the Petition completely violates Supreme Court Rule 14.1(g)(i) which requires *inter alia* that the Petitioner specify the stage of the proceedings when the matters were raised with "pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears . . . .":[8]

> If review of a state-court judgment is sought, specification of the stage in the proceedings, **both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotation of specific portions of the record or summary thereof, with specific references to the places in the record where the matter appears** (e.g., court opinion ruling on exception, portion of court's charge and exception thereto, assignment of error) **so as to show that the federal question was timely and properly raised and that this Court has jurisdiction** to review the judgment on a writ of certiorari . . . ."

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[8] See Petition, pages 7-9.

Petitioner failed to comply with any portion of Rule 14.1(g)(i). Why? Because the matters now raised in the first Question (i.e., the Special Master's Final Report), were never raised below until a Motion for Rehearing after the decision of the New Mexico Supreme Court. Even then, the so-called "Chevron deference" claim was not raised or argued.

The claims made in Questions Two and Three of the Petition were never raised at any time. Question Two is completely fallacious. At no time did any court or Respondent state that Federal Regulations do not have the force of law. In fact, Respondent claimed that Federal Regulations and the Special Master required that the award be distributed "in accordance with the law of the decedent's domicile."

Question Three is also fallacious. The Supreme Court did not ignore any ruling of the Special Master. The Supreme Court implemented the Special Master's Award by distributing "the award in accordance with the law of the decedent's domicile." Petitioner never argued that the Special Master's award nor the accompanying federal regulations required that she be given one-half of the Award. She argued that New Mexico community property and wrongful death law required that she be awarded the money.[9] The

---

[9] Petitioner's Brief before the Supreme Court stated the issues as follows:

> A. *STATEMENT OF THE ISSUES* 1. THE DISTRICT COURT PROPERLY ENTERED SUMMARY JUDGMENT CONFIRMING THE AWARD OF THE SPECIAL

(Continued on following page)

Chevron doctrine was never mentioned in the lower courts. Petitioner is inventing a federal question and ignoring the record and this Court's Rules.

Because the matters now raised were not raised below, Petitioner did not comply with Supreme Court Rule 14.1(i)(v) requiring an Appendix sufficient to show that the matters were raised below. See Rule 14.1(g)(i).

Even the claimed significance of the Final Report which was raised in her Motion for Rehearing was untimely under New Mexico law because it was not raised in the lower courts or in her Brief before the Supreme Court. See NMRA 1-046 and NMRA 12-216 and NMRA 12-404. The arguments and authorities now raised were available to be raised in the trial court at least sixteen months before its decision and four years prior to the decision of the New Mexico Supreme Court. The Final Report was not raised because it is a report, not a regulation and it does not conflict with the decision below.

On June 24, 2004, the Special Master made an award to the Personal Representative of the Estate

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MASTER OF THE SEPTEMBER 11TH VICTIMS COMPENSATION FUND AND DISTRIBUTING THE AWARD IN ACCORDANCE WITH THE LAW OF DECEDENT'S DOMICILE. (1) *Economic Damages as Community Property* (2) *Economic Damages Distributable Under the Wrongful Death Statute*

(Pages 7, 10-11 of Petitioner's Brief before New Mexico Supreme Court.)

of Alfred Marchand. (RP 187, App. 1) The award expressly states that it is to be "paid to the Personal Representative who is legally obligated to distribute the award in accordance with the laws of the decedent's domicile." (Id.)

On July 19, 2004, Joshua Marchand filed a verified complaint for injunctive relief alleging that the Personal Representative, Rebecca Marchand, had threatened to take the proceeds from the September 11th fund and distribute them entirely to herself and her son, Trae Hale, in violation of New Mexico law, the Special Master's Award and federal regulations. (RP 1)

On August 10, 2004, the District Court entered an order in which the informal probate was removed from the Otero County Probate Court to the District Court and continued as a supervised administration. (RP 122-123)

The Special Master issued his Report of Activities cited by Petitioner in Question One and throughout the Petition **on November 18, 2004. Seven months later**, cross motions for summary judgment were filed by the parties (RP 162 and 227), Joshua Marchand's filing on June 3, 2005 and Rebecca Marchand's on July 12, 2005. On August 12, 2005, Rebecca Marchand filed her Reply to Joshua Marchand's Response to her Motion for Summary Judgment. The "Final Report" of the Special Master was never mentioned.

On March 21, 2006, some seventeen months after the Special Master's "Final Report," the trial Court entered summary judgment. (RP 320) The following uncontested facts were submitted to the trial court by Joshua Marchand in support of his Motion for Summary Judgment.

1. Joshua Marchand is the natural son of Alfred G. Marchand, deceased. Joshua Marchand resides in and is domiciled in Alamogordo, Otero County, New Mexico. (RP 1 and RP 163, ¶ 1, RP 203)

2. Rebecca L. Marchand is the widow of Alfred G. Marchand, and the Personal Representative of the estate of Alfred G. Marchand. Rebecca L. Marchand resides in and is domiciled in Alamogordo, Otero County, New Mexico. CCP 75-01. (Id. ¶ 2, RP 82, 163, 203)

3. Alfred G. Marchand was a resident and domiciled in Alamogordo, Otero County, New Mexico until his death on September 11, 2001. Alfred G. Marchand was an occupant of an airplane that crashed into the World Trade Center. (Id. ¶ 3, RP 82, 163, 203)

4. On September 17, 2001, Rebecca Marchand filed an Application for Informal Appointment of Personal Representative (No Will) in the Probate Court of Otero County, New Mexico, CCP-75-01, and was appointed Personal Representative. Letters of Administration reciting that there was no will were issued that same day to Rebecca Marchand. (RP 24, 82, 85, 90)

5. On July 19, 2004, Joshua Marchand filed his complaint. (RP 1)

6. On August 10, 2004, the District Court ordered that the probate be removed to the District Court. (RP 122)

7. On June 24, 2004, Rebecca Marchand, as Personal Representative of the Estate of Alfred G. Marchand was awarded $1,847,969.88 reduced for collateral offsets for amounts she and her son received of $1,035,498.00, further reduced by $25,000 received by the Estate of Alfred G. Marchand and further reduced by the sum of $17,500.00 which Joshua Marchand received to a net Award of $769,971.88. See Award dated June 24, 2004 from Kenneth R. Feinberg, Special Master, September 11th Victim Compensation fund, attached hereto. (RP 164, 187, App. 1)

8. Rebecca L. Marchand received non-charitable benefits in the amount of $1,077,998.00 from the death of Alfred G. Marchand. Her son, Trae Hale, received non-charitable benefits of $23,177.00. Joshua Marchand, Alfred G. Marchland's natural son, received $17,500.00. (RP 164 ¶ 5)

9. The Special Master ordered that:

> **This award will be paid to the Personal Representative who is legally obligated to distribute the award in accordance with the laws of the decedent's domicile.** The distribution must be based on either an agreement of all potential beneficiaries (if

> capable of consenting under applicable state law) or at the direction of a court of competent jurisdiction **in accordance with the law of the decedent's domicile**. (RP 187, App. 1)

10. Exhibit A to Compensation Form for Deceased Victims signed by Rebecca L. Marchand, Personal Representative states in part:

> The rules that govern the Victim Compensation Fund state that **only one claim may be filed in connection with the death of a Victim and that the claim must be filed by the Victim's Personal Representative.** The rules also state that any award from the Victim Compensation Fund shall be paid to the Personal Representative and that **the Personal Representative is required to distribute the award among the Victim's beneficiaries in accordance with the laws of the Victim's domicile.** (RP 189)

11. In the final submission to the Victim Compensation Fund, (a portion of the September 11th Victim Compensation Fund Compensation Form for Deceased Victims) Certification of Distribution Plan which was signed by Rebecca L. Marchand as the Personal Representative she states:

> **I hereby agree to distribute any award in a manner consistent with the law of the decedent's domicile or any applica ble ruling by a court of competent ju risdiction or as directed by the Special**

> **Master.** I understand that the final distribution plan may differ from the plan proposed in Part II J.

12. The Special Master ordered that the Economic Loss portion of the award, $1,397,969.88 be **"distributed according to the wrongful death law of the decedent's domicile."** (RP 187, App. 1)

13. The Special Master ordered that the Non-economic Loss portion of the award, $250,000 be distributed **"in accordance with a will, or if there is no will, the intestate law of the decedent's domicile."** (RP 187, App. 1)

14. The Special Master further ordered a Non-economic Loss award of $100,000 for each spouse and/or dependent. (RP 187, App. 2)

15. The Special Master further ordered that **"collateral offsets should first be applied to the share of the individual who received the benefit. Any excess benefit should be applied to the remaining shares of the award. However, pursuant to an agreement of the parties or court order, a reallocation of collateral offsets may be appropriate under the circumstances."** (RP 188, App. 4)

16. The Special Master found collateral offsets in the amounts set out in paragraphs seven and eight (7 & 8) above.

From these facts[10] and as required by the Special Master's Award, the New Mexico Supreme Court applied New Mexico law and awarded $100,000 to Rebecca Marchand, $100,000 to Trae Hale, and the remainder of $569,971.88 to Joshua Marchand. The non-economic award was $250,000 and the economic award was thus $319,971.88 ($569,971.88 minus $250,000). Because of collateral offsets of more than one million dollars ($1,077,998.00) received by Rebecca Marchand she was not entitled to one-half of the economic award, $159,985.94. This decision was in strict accordance with both the Special Master's Award and New Mexico wrongful death law.[11]

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[10] Rebecca Marchand did not set out any additional facts in any Court that are relevant to the instant Petition. See Rebecca Marchand's Supreme Court Answer Brief, pages 2-3.

[11] See footnote 15 and *Marchand v. Marchand*, 199 P.3d 281, 286 (N.M. 2008): {25} We disagree that the Special Master's language has no effect on the award distributions. **A plain reading of this language indicates a directive to the Personal Representative to be followed in calculating the appropriate distribution of the remaining award among the beneficiaries.** We also note that the Special Master's letter provided a breakdown of collateral offsets, showing the amount of collateral benefits attributable to each individual beneficiary – $1,012,321 to Rebecca, $25,000 to the Estate, $23,177 to Trae, and $17,500 to Joshua. This breakdown, taken in conjunction with the language directing that collateral offsets "should first be applied to the share of the individual who received the benefit," persuades us that the Special Master intended that individual collateral offsets should be applied as an offset to individual awards. **If that were not the Special Master's intent, there would seem to be no reason to set forth a breakdown of collateral benefits individually, as opposed to just one lump-sum award.**

Until the instant Petition, the *Chevron* decision was not cited in any Court nor was its rationale urged upon any previous court. According to 22 Moore's *Federal Practice 3D* §406.05[3][c][A], "A petitioner who fails to comply with rules prescribing how contentions are to be brought to a state court's attention will not be able to obtain Supreme Court review . . . ."

Pursuant to NMRA 12-216 and 12-404, the questions now raised in the instant Petition were not preserved for review in the New Mexico appellate courts because prior to the motion for rehearing filed in the Supreme Court of New Mexico in October, 2008, Petitioner, Rebecca Marchand did not claim that the Final Report modified the Award of June 24, 2004.

Having lost on the theory she advanced in all lower courts, i.e. that New Mexico community property law required that she receive the entire economic award. (See appendix, A-44 ¶ 6), Petitioner can not change her theory of the case, to claim that a "Final Report" issued November 18, 2004, five (5) months after the June 24, 2004 Award modified the Award.

Nor did Petitioner timely raise the Final Report when she first made the claim in the New Mexico Supreme Court in a Petition for Rehearing filed more than four years after the Report was issued.

NMRA 12-404 entitled Rehearings, provides that the movant show the court, "the points of law or fact which in the opinion of the movant the court has overlooked or misapprehended . . . ." A court cannot overlook or misapprehend a matter that was never raised at any time in the proceeding. See *State v.*

Curlee, 98 N.M. 576, 579, 651 P.2d 111, 114 (N.M. App. 1982):

> **Additionally, it has been an unwavering rule in this jurisdiction for almost seventy years that new points may not be presented in a petition for rehearing.** *Dow v. Irwin*, 21 N.M. 576, 157 P. 490 (1916). *See also Weese v. Stoddard*, 63 N.M. 20, 312 P.2d 545 (1956); *Lea County Water Co. v. Reeves*, 43 N.M. 221, 89 P.2d 607 (1939); *In re White's Estate*, 41 N.M. 631, 73 P.2d 316 (1937); *Ellis v. Citizen's Nat. Bank*, 25 N.M. 319, 183 P. 34 (1919). As the court noted in *Reeves, supra*, when a petitioner for rehearing has had several opportunities to challenge the sufficiency of the record to reflect the happenings at trial and has not availed himself of those opportunities either at trial or during the course of the appeal, **it is too late on the motion for rehearing to expect the reviewing court to become involved in considering a contention of fact not appearing in the record or transcript presented.**
>
> Excerpt from *State v. Curlee*, 98 N.M. 576, 579, 651 P.2d 111, 114 (N.M. App. 1982)

The arguments made in the Petition for Certiorari having never been timely raised below, should not now be considered by this Court. According to 22 Moore's *Federal Practice 3D* §406.05[3][c][iii][A], "The Court will refuse to address an issue raised in the state supreme court brief because the state appellate

courts generally do not consider issues raised for the first time on appeal." Citing *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3, 103 S. Ct. 2296, 76 L. Ed. 2d 497 (1983). See also *Stembridge v. Georgia*, 343 U.S. 541, 547, 72 S. Ct. 834, 96 L. Ed. 1130 (1952).

At 22 Moore's *Federal Practice 3D* §406.05[3][a][i] the requirement that the federal issue be specially set up or claimed is discussed:

> Section 1257 provides for Supreme Court certiorari review of cases in which either: the validity of a federal treaty or statute or of a state statute seen as repugnant to federal law is 'drawn in question'; or in which any title, right, privilege or immunity is 'specially set up or claimed' under federal law. **The terms 'drawn in question' and 'specially set up or claimed' require not only that the issue be brought up but that it be brought up expressly and at the right time.** Most recent Court cases generally require that the issue either be 'pressed or passed upon': **either raised by the petitioner in the appropriate way and time** or actually decided by the appropriate Court or both.
>
> "[C]omity to the States, and . . . a constellation of practical considerations" cause the Court to review only issues that state courts have passed or pressed upon.

This Court's decision in *Adams v. Robertson* 520 U.S. 83, 86-92, 117 S. Ct. 1028, 1029-1032

(U.S. Ala. 1997) describes the requirement that the issues be previously presented to the state courts:

> With "very rare exceptions," *Yee v. Escondido,* 503 U.S. 519, 533, 112 S.Ct. 1522, 1531, 118 L.Ed.2d 153 (1992), **we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.** See *Heath v. Alabama,* 474 U.S. 82, 87, 106 S.Ct. 433, 436-437, 88 L.Ed.2d 387 (1985); *Illinois v. Gates,* 462 U.S. 213, 217-219, 103 S.Ct. 2317, 2321-2322, 76 L.Ed.2d 527 (1983); *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430, 434, 60 S.Ct. 670, 672, 84 L.Ed. 849 (1940). As petitioners concede here, the Alabama Supreme Court did not expressly address the question on which we granted certiorari. See Reply Brief for Petitioners 2-3, n. 1.
>
> [3] **Nor have petitioners met their burden of showing that the issue was properly presented to that court. When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented,** *87 *Board of Directors of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 550, 107 S.Ct. 1940, 1948, 95 L.Ed.2d 474 (1987), **and the aggrieved party bears the burden of defeating this assumption,** ***ibid.,*** **by**

demonstrating that the state court had "a fair opportunity to address the federal question that is sought to be presented here," *Webb v. Webb,* 451 U.S. 493, 501, 101 S.Ct. 1889, 1894, 68 L.Ed.2d 392 (1981). We have described in different ways how a petitioner may satisfy this requirement. See *Street v. New York,* 394 U.S. 576, 583-585, 89 S.Ct. 1354, 1361-1362, 22 L.Ed.2d 572 (1969). In some cases, we have focused on the need for petitioners either to establish that the claim was raised "'at the time and in the manner required by the state law,'" *Bankers Life & Casualty Co. v. Crenshaw,* 486 U.S. 71, 77-78, 108 S.Ct. 1645, 1650, 100 L.Ed.2d 62 (1988) (quoting **1030 *Webb, supra,* at 501, 101 S.Ct., at 1894), see, *e.g., Exxon Corp. v. Eagerton,* 462 U.S. 176, 181, n. 3, 103 S.Ct. 2296, 2301, n. 3, 76 L.Ed.2d 497 (1983); *Beck v. Washington,* 369 U.S. 541, 549-554, 82 S.Ct. 955, 959-963, 8 L.Ed.2d 98 (1962), or to persuade us that the state procedural requirements could not serve as an independent and adequate state-law ground for the state court's judgment, see, *e.g., Hathorn v. Lovorn,* 457 U.S. 255, 262-265, 102 S.Ct. 2421, 2426-2428, 72 L.Ed.2d 824 (1982). **In other cases, we have described a petitioner's burden as involving the need to demonstrate that it presented the particular claim at issue here with "fair precision and in due time,"** *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 67, 49 S.Ct. 61, 63, 73 L.Ed. 184 (1928); *PruneYard Shopping*

> *Center v. Robins,* 447 U.S. 74, 85, n. 9, 100 S.Ct. 2035, 2043, n. 9, 64 L.Ed.2d 741 (1980). See generally 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4022, pp. 322-339 (1996).
>
> But however we phrase our requirements, petitioners here have failed to satisfy them. **Petitioners have done nothing to demonstrate that they complied with the applicable state rules for raising their federal due process claim before the Alabama Supreme Court, or to explain why the failure to *88 comply with those rules would not be an adequate and independent ground for the state court to disregard that claim.**
>
> Excerpt from *Adams v. Robertson*, 520 U.S. 83, 86-92, 117 S.Ct. 1028, 1029-1032 (U.S. Ala. 1997)

As in *Adams*, Petitioner failed to meet her burden to show that the matters raised herein were properly and timely raised in New Mexico courts. Hence the Petition should be denied.

Point III. The Special Master's Report does not alter the decision of the New Mexico Supreme Court because it does not conflict with the Award.

The purpose of the September 11th Fund was to provide compensation to the "relatives of a deceased individual . . . who was killed as a result of the

terrorist-related aircraft crashes of September 11, 2001." 49 U.S.C. §40101, Title IV, Sec. 403. "The money was to be paid to the 'personal representatives' of those who were killed as a result of the crashes." 28 C.F.R. §104.1. Joshua Marchand is the son of the deceased, a relative.

Even if this Court were to consider the Final Report, the decision made by the New Mexico Supreme Court would not change. The Special Master in his Award dated June 24, 2004 ordered that **"collateral offsets should first be applied to the share of the individual who received the benefit. Any excess benefit should be applied to the remaining shares of the award. However, pursuant to an agreement of the parties or court order, a reallocation of collateral offsets may be appropriate under the circumstances."** (RP 41) The Special Master determined the specific amounts of collateral offsets to be used in making the final distribution. (RP 40) The Special Master knew the amounts of the various components of the Award, the amounts of the collateral offsets and the effects his order would have on the parties.

Petitioner is asking this Court to rewrite the Award by reference not to a law or regulation, but to a post-Award report. There is nothing in the Report indicating that the Special Master intended his Final Report to modify any actual Award. The Final Report is not a law or regulation. Whatever deference it deserves, it does not alter the actual Award.

According to the Report, the Personal Representative had the right to request[12] that the Special Master allocate the award in a manner differently than the manner that the Special Master prescribed. In fact, she did, but not successfully.[13] She was represented by counsel before the Special Master and had the right to make the request. It simply was not granted.

As set forth in the Federal Regulations, 28 C.F.R. §104.52, the Special Master had the power to reallocate the award based upon personal circumstances if he made that conclusion of fact. (See footnote 1) However, in this case, the Special Master did not reallocate the award as Petitioner now wants this Court to do because of a Report issued after the Award.

Additionally, the Final Report does not conflict with the decision of the New Mexico Supreme Court

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[12] "**Where the Personal Representative elected allocation** pursuant to a *Kaiser* formula, ..." fn. 171, p. 93, Final Report of Activities

[13] During the hearing of April 28, 2004 before the Special Master, Rebecca Marchand proposed that the economic loss award be distributed entirely to herself. There is no record of her request to cite to this Court and Joshua Marchand was unaware of her request until she filed her Second Motion to Supplement the Record on Appeal before the New Mexico Supreme Court. (See p. 41, lines 17-20 of attachment to Third Motion to Supplement, transcript of April 29, 2004) That motion was denied because neither the transcript nor the argument was made to the trial court. Nevertheless, no matter what she requested or could have requested, the Special Master delivered his decision in the Award of June 24, 2004. (RP 40-41).

which complied with the Special Master's Award and ordered an offset of the collateral source funds received by Petitioner against the share of the individual receiving the same.

Rebecca Marchand received almost seven times the amount of the economic damages she claims in collateral benefits. She received $1,077,998.00 dollars in collateral benefits. She now claims one-half of the economic award or an additional $159,985.94. She has received seven times more than her claimed one-half of the economic award.

In the case at bar, the Special Master specifically ordered that **"collateral offsets should first be applied to the share of the individual who received the benefit."** (RP 4) The Special Master found specific amounts of collateral offsets to be used in making the final distribution. (RP 40) The Special Master did not make the determination now sought by Petitioner.

In fact, Petitioner in her Motion for Rehearing before the New Mexico Supreme Court admitted that the Special Master did not make the award she now requests from this Court. In her Brief in Support of Motion for Rehearing she states at page 12:

> "**Had this matter been decided by the Special Master**, a dependent surviving spouse, such as Mrs. Marchand, **would be entitled to consideration** from spousal support for the remainder of her life

> resulting in a distribution of at least one-half of the economic recovery."

She makes the same concession at page 30 of her Petition, but now ups the amount of the loss to one hundred percent:

> There can be no doubt that if the Fund were still in existence, the Special Master **would probably** have reallocated and provided the entire amount of economic loss award to the spouse, consistent with the concepts underlying the September 11th Fund.[14]

The New Mexico Supreme Court correctly concluded that it was required to follow the actual Award of the Special Master, apply New Mexico law and deduct the collateral offsets received by Rebecca Marchand from the economic loss award and distribute that amount to the remaining share. Moreover, that Court held that subtracting the collateral benefits from Rebecca's share followed New Mexico law and the Special Master's decision.

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[14] Under New Mexico Court Rules, NMRA 12-502C(2), " . . . **only the questions set forth in the petition will be considered by the Court.**" Rebecca did not file a cross petition for certiorari. See NMRA 12-502D. She did not raise any issue in regard to reexamining the decision of the Court of Appeals in her Response to Petition for Certiorari. Hence all matters ruled upon by the Court of Appeals to which no review was sought in this Court are determined. See *Fikes v. Furst*, 134 N.M. 602, 81 P.3d 545 (N.M. 2003). Rebecca cannot argue now that she is entitled to the entire economic award.

The Special Master's Final Report is a report detailing the activities of the office of the Special Master. There is nothing in the Final Report that indicates that it was intended to be a regulation or that it was intended to alter or modify any Award made by the Special Master or that it was even intended as an interpretative guide; it is simply a report of his activities.

The first sentence of the Report states that the document is a report of activities of the Special Master: "As the Special Master for the September 11th Victim compensation Fund of 2001 (the "Fund"), I respectfully submit this Report detailing the activities of the Fund."

The Final Report is not a rule or regulation or an interpretative guide. It contains no legal or precedential authority. See *Schneider v. Feinberg*, 345 F.3d 135, 145 (2nd Cir. 2003) (public statements by the Special Master, "do not command Chevron deference because they are not binding dispositions that carry the force of law.") This same reasoning applies to the e-mail from Mr. Feinberg which is unpublished, edited by Petitioner, not available to Respondent to review, created without input from Respondent and which states only what he "probably" would have done. (Petition, p. 19)

Even if the Report has some precedential or legal authority, the Report specifically states that the Special Master will only approve plans for distribution that appropriately compensate family members.

("Fairness and the evaluation of individual factors would be accomplished by allowing the Special Master to direct distribution to specific family members if the Personal Representative's proposed plan did not appropriately compensate these relatives.)

In the case at bar, the Special Master's Award did not find any circumstances justifying an award to the widow of a greater proportion of the award. He did determine that **"collateral offsets should first be applied to the share of the individual who received the benefit."**

Furthermore, an examination of the Special Master's Report does not change the decision of the New Mexico Supreme Court. Parts of the Special Master's Report cited by Petitioner are emphasized below. These parts, as will be explained below, show that no change should be made in the New Mexico Supreme Court's determination.

E. Distribution

> The Act's silence regarding the distribution of awards for decedents' claims created a huge vacuum in the administration of the Fund. While the Act was intended to benefit the families of deceased victims, questions regarding which family members should be included in a plan of distribution and how the award should be allocated were left to the Department and the Special Master to resolve. The Regulations and the procedures developed by the Fund attempted to create a mechanism for the allocation of awards that

would be consistent among similarly situated families, efficient, and easy to administer, but would also allow for the consideration of the individual needs of the families. **The Department and the Special Master determined that these goals would be best served by distributing the award in a manner consistent with the law of the decedent's domicile.** Consistency would be assured by authorizing the Special Master to approve or disapprove the plan depending on whether it complied with state law. Efficiency would be served by requiring the Personal Representative to submit a plan of distribution to the Fund for the Special Master's approval, thereby eliminating the involvement of the state courts where the Special Master determined that the plan followed state law. **Fairness and the evaluation of individual factors would be accomplished by allowing the Special Master to direct distribution to specific family members if the Personal Representative's proposed plan did not appropriately compensate these relatives.**

The Regulations require the Personal Representative to distribute the award in a manner consistent with the law of the decedent's domicile or any applicable rulings made by a court of competent jurisdiction. In order to monitor the actions of Personal Representatives in meeting this obligation, the Personal Representative was required to submit a proposed distribution plan to the Special Master.

> **If the distribution plan submitted appeared to be consistent with state law, the Fund approved the plan; if it did not comply with state law, the plan was not approved. In the latter case, the Personal Representative would need to seek a determination from the relevant state court as to the proper distribution of funds.**

As shown by the sentences emphasized, the Special Master based upon fairness and evaluation of individual factors could **"direct distribution to specific family members if the Personal Representative's proposed plan did not appropriately compensate these relatives"** In the instant case, the Special Master did not exercise this power and instead directed that the award be distributed based upon state law.

Additionally above emphasized portions of the Report state that the plan must comply with state law or the Personal Representative would need to seek a determination from the relevant state court as to the proper distribution. The New Mexico Supreme Court is the relevant state court.

In the next portion of the Report cited by Petitioner, the Special Master discusses distribution of the economic portion of the award and describes the rules of distribution in most states concerning

distribution in accordance with pecuniary loss.[15] The Special Master again states that the Personal Representative could submit a plan of distribution that varied from the law of the state of the decedent's domicile. Apparently she did. However, the Special Master did not reallocate the Award as she requested presumably because the Personal Representative received substantial collateral assets of $1,077,998.00 dollars, more than seven times the half of the economic damages she now requests this Court to order.

This portion of the Report reads:

> Unlike wills and state intestacy laws, which delineate the identity of the distributee as well as the portion of the estate the distributee should receive, **the wrongful death law of most states provides that damages should be distributed to those eligible to recover under a state's intestacy law, "in proportion to their pecuniary loss.** "A finding of proportionate "pecuniary loss" often required a court to engage in time-consuming fact-finding. **However, the goal of efficient and speedy resolution of**

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[15] New Mexico wrongful death law does not make awards based upon pecuniary loss, but by relationship with the deceased. See *Leyba v. Whitley*, 120 N.M. 768, 775-776, 907 P.2d 172, 179-180 (N.M. 1995) at ¶ 21, "The legislature has by statute specifically designated a discrete and identifiable class of beneficiaries of any wrongful death claim, and each beneficiary shares equally with the others regardless of what may have been his or her individual pecuniary expectancy in the continued life of the deceased."

claims obviously would not have been served had the Fund regularly engaged in distribution plan hearings to determine the "pecuniary harm" of significant numbers of beneficiaries. In order to avoid this result and provide Personal Representatives and their attorneys with guidance regarding "pecuniary loss," the Fund adopted criteria considered by state courts. **Generally, the Fund determined that the economic portion of a plan of distribution would be approved if the allocation either followed the intestate law of the state of domicile or,** in the case of distribution between a spouse and children, a formula developed by the New York Surrogate's Courts in In re Kaiser Estate that based pecuniary loss on remaining years of dependency. These criteria provided the Personal Representative with some flexibility while still protecting the interests of beneficiaries. For example, **the option** of relying upon the Kaiser formula was particularly helpful to a spouse with older minor children, since under those circumstances the Kaiser formula would provide a larger portion of the economic award to a spouse with many years of remaining dependency than an allocation based on the intestate laws, which usually split the estate equally between a spouse and children.

In some situations, the Fund concluded that certain state laws created potential hardships for claimants by limiting a spouse's share to less than half of the

> economic recovery. To address these circumstances, the Special Master determined that, in the interest of both uniformity and fairness, **it would be appropriate to allow every Personal Representative the option** of utilizing the Kaiser formula for allocation of the economic portion of the award . . . Special Master, Final Report, pages 58-60.

In the instant case the Personal Representative had the option to utilize the Kaiser formula. She did not and whatever her plan of distribution was, the Special Master ordered that **"collateral offsets should first be applied to the share of the individual who received the benefit. Any excess benefit should be applied to the remaining shares of the award."** (RP 41)

Since the Special Master also determined the amount of collateral offsets, (see ¶¶ 7 & 8 above) he knew the result that his order was dictating and he knew that Rebecca Marchand would receive seven times the amount received by Joshua Marchand for economic damages because of her collateral benefits. If the Special Master had intended there be no collateral offsets or that the Personal Representative receive a larger share of the economic damages, the Award would have said that; it did not.

The rules governing the Fund in question and answer fashion state that the Special Master may provide a greater share to a spouse based upon the

facts presented. He simply did not. See Section 3.2 as follows:

> Note: The determination of the Personal Representative is not the same question as the determination of who ultimately will receive the award. **The Personal Representative shall distribute the award in a manner consistent with the law of the decedent's domicile or any applicable ruling made by a court of competent jurisdiction.** However, in order to assure that the families of **needy** Victims receive adequate compensation, the regulations further provide that the Personal Representative shall, before payment is authorized, provide to the Special Master a plan for distribution of any award received from the Fund. Notwithstanding any other provision of these regulations or any other provision of State law, **in the event that the Special Master concludes that the Personal Representative's plan for distribution does not appropriately compensate the Victim's spouse, children, or other relatives, the Special Master may direct the Personal Representative to distribute all or part of the award to such spouse**, children, or other relatives. (RP 314)

In this case, the Special Master did not make the conclusion now requested and direct a larger award to Rebecca Marchand.

Further the Fund recognized that there might be different distributions depending upon the decedent's

domicile. Thus, New York law would not be followed in the case of a deceased from New Mexico. See Section 5.10:

> **If the award distribution is based on State law, will that mean that different distributions will occur depending on where the Victim lived?**
>
> **Yes. It is certainly possible that there will be different distributions schemes in different states.** (RP 315)

The Fund rules also stated that if the Personal Representative believed that the collateral offset would create a hardship, she could request that the Special Master reallocate the collateral offsets.

> Generally, collateral source payments, also known as collateral offsets, will be applied against the share of the individual who received the benefit. Any excess benefit will be applied against the remaining shares of the award. **However, a departure from this general policy may be warranted in certain circumstances. For instance, if the Personal Representative believes that a hardship is created by applying collateral offsets against individual shares, he/she may send a written request to the Special Master for a reallocation of collateral offsets. The Special Master will determine whether a reallocation is appropriate under the circumstances and will advise the claimant accordingly** . . . (RP 315)

In the case at bar, as conceded by Petitioner, the Special Master did not determine to reallocate the collateral offsets.

Point IV. Response to certain misleading claims in the Petition.

In response to certain of the claims made in the Petition, Joshua Marchand states that his participation in the process was limited because as recognized in the Petition, only the Personal Representative could represent the estate before the Special Master. (See Petition, p. 5, 6 and see 49 U.S.C. §40101 Title IV, Sec. 405(c)(3)(A) and 28 C.F.R. §104.2(a)(2)).

Petitioner misrepresents the reasoning of the New Mexico Supreme Court when she states that it based its entire decision on "equitable considerations" (Petition, p. 9) or that "there is only the blue sky behind its decision." (Petition p. 26). The decision is based upon New Mexico wrongful death law and on the Special Master's Award both of which require collateral offsets.[16] The Special Master ordered that

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[16] See fn 4. And see *Marchand v. Marchand*, 199 P.3d 281, 287 (N.M. 2008): {27} Under these circumstances, the Special Master's directive embodies a basic notion of fairness. It seeks to avoid excessive compensation for one beneficiary at the expense of the remaining beneficiaries. ***See, e.g., Strickland v. Roosevelt County Rural Elec. Coop.*, 103 N.M. 63, 64, 65, 702 P.2d 1008, 1009, 1010 (Ct.App. 1984) (holding that the proceeds of a wrongful death award should be divided into equal shares and each beneficiary should reimburse the compensation carrier from his equal share of**

(Continued on following page)

the economic award be "distributed according to the wrongful death law of the decedent's domicile."[17]

Finally, even Petitioner's Conclusion at page 34 takes out of context the statement made by Mr. Feinberg reported at 19 Washington University, *Journal of Law & Policy*, p. 25 entitled: "*Speech: Negotiating the September 11 Victim Compensation Fund of 2001: Mass Tort Resolution without Litigation.*" Petitioner conveniently omitted from her quotation to this Court Mr. Feinberg's statement that it is **state law** that is the deciding factor if the parties could not mediate the matter.

> We worked out almost all of these claims [disputes between claimants]. **Where we could not get an agreement, we did the only sensible thing: we looked to state tort law and the state's estate law of the victim's domicile. If somebody gets killed in an automobile accident in St. Louis, there is law that has been tested to see who takes the money.** That is what we did. Usually half to the spouse and the other half to the children. Same-sex partner?

---

the total judgment "the amount of workers compensation benefits received by that beneficiary," and noting that "[t]his makes each beneficiary whole and avoids double recovery by either"). For the purpose of clarity we repeat: Rebecca is not entitled to any of the economic loss component of the award. Joshua is entitled to all of the individual economic loss award.

[17] See footnote 3.

> **Go fight in the surrogates' court if we cannot resolve the dispute.** I cannot be all things to all people. I have got to *move* on this program, and that is how we dealt with this problem.

Petitioner's quote was misleading.

CONCLUSION

The Award issued by the Special Master requires distribution of the award in accordance with the laws of the decedent's domicile, not a federal matter. It also required, as does New Mexico law, the offset of collateral benefits received by Rebecca Marchand of $1,012,321.00 dollars from the economic Award, one-half of which is $159,985.94. Clearly, when Rebecca Marchand has received seven times this amount in collateral benefits, she has in fact received at least one-half of the economic award.

None of the arguments now advanced by Petitioner were timely made in any lower Court and should not now result in the issuance of a Writ.

The Personal Representative had the right and apparently did request that she be given a larger portion of the Award but the Special Master declined the invitation as should this Court.

Wherefore, premises considered, Respondent prays that the Petition be denied.

Respectfully submitted,

STEVEN K. SANDERS
STEVEN K. SANDERS &
ASSOCIATES, LLC
820 Second Street, NW
Albuquerque, New Mexico 87102
Telephone (505) 243-7170

Counsel for Respondent

[LOGO] **U.S. Department of Justice**
September 11th Victim Compensation Fund

P.O. Box 18698
Washington, D.C. 20036-8698

June 24, 2004

REBECCA L MARCHAND
C/O MILTON G. SINCOFF
KREINDLER & KREINDLER
100 PARK AVENUE 18TH FLOOR
NEW YORK, NY 10017
USA

Dear REBECCA L MARCHAND:

Re: Claim for ALFRED G. MARCHAND

This letter serves to notify you that a final award determination has been made by the September 11th Victim Compensation Fund ("Fund"). This award will be paid to the Personal Representative who is legally obligated to distribute the award in accordance with the laws of the decedent's domicile. The distribution must be based on either an agreement of all potential beneficiaries (if capable of consenting under applicable state law) or at the direction of a court of competent jurisdiction in accordance with the law of the decedent's domicile.

Awards from the Fund include three general components: 1) compensation for economic loss to be generally distributed according to the wrongful death law of the decedent's domicile, 2) $250,000 for

non-economic h rm distributed in accordance with a will, or if there is no will, the intestate law of the decedent's domicile, and 3) a $100,000 non-economic award for each spouse and/or dependent. The Fund must also deduct "collateral sources" from the award, which includes life insurance, pension funds, death benefit payments, and payments by Federal, State, or local governments related to the terrorist-related aircraft crashes of September 11, 2001.

Based on the information submitted, the aggregate final award has been determined to be $769,971.88. This award was calculated as follows:

Economic Loss	Non-Economic Loss To Estate	Non-Economic Loss To Spouse/Dependents – $100,000 to each of the following:	Collateral Offsets	Total Amount
$1,397,969.88	$250,000.00	TRAEE HALE, REBECCA MARCHAND	$1,077,998.00	$769,971.88

Generally, collateral offsets should first be applied to the share of the individual who received the benefit. Any excess benefit should be applied to the remaining shares of the award. However, pursuant to an agreement of the parties or court order, a reallocation of collateral offsets may be appropriate under the circumstances. Collateral offsets of $1,077,998.00 were received by the following beneficiaries:

Name of Individual	Relationship to Decedent	Amount of Collateral Offsets
TRAEE HALE	STEP-SON	$23,177.00
JOSHUA MARCHAND	CHILD	$17,500.00
REBECCA MARCHAND	SPOUSE	$1,012,321.00
ESTATE OF ALFRED MARCHAND	ESTATE	$25,000.00
Total		$1,077,998.00

Sincerely,

/s/ Kenneth R. Feinberg
Kenneth R. Feinberg
Special Master
September 11th Victim
Compensation Fund

CC: TRAEE HALE, JOSHUA MARCHAND, NEW MEXICO – PROBATE COURT OF OTERO COUNTY

127

NO. 08-1124

Supreme Court, U.S.
FILED
APR 16 2009
OFFICE OF THE CLERK

In The Supreme Court Of The United States

REBECCA L MARCHAND, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ALFRED G. MARCHAND, DECEASED,

Petitioner,

v.

JOSHUA MARCHAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

STEVAN J. SCHOEN, ESQ.
4 HILLSIDE DRIVE
PLACITAS, NEW MEXICO 87043
(505)867-2802
(505)771-0984 (FAX)
schoenlaw@comcast.net
Counsel for Petitioner

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION OF THE PETITION FOR WRIT OF CERTIORARI

The Petitioner, by and through her attorney hereby files her Reply to the Brief in Opposition of the Petition for the Writ of Certiorari.

INTRODUCTION

This case is about a matter of national importance. The Brief in Opposition filed by the Respondent categorically ignores the events of September 11th, 2001 and the legislative response to these events by the Congress and President of the United States of America.

Our country faced a unique national tragedy; a terrorist attack of unprecedented violence upon unsuspecting, entirely innocent civilians.

As a result of these events, the September 11th Victim Compensation Fund was created as a part of the Air Transportation Safety and System Stabilization Act of 2001. Pub. L. 107-42, 115 Stat 230 (2001). The Homeland Security Act was enacted. The President authorized military action in Iraq and Afganistan. To deny that there events were a national federal response is to deny the significance of September 11th and the lessons we have learned, in dealing with its aftermath. There can be no question that his case raises important questions of federal law in its own right and for future situations involving mass injury.

ARGUMENT

POINT 1.

THE PURPOSE OF THE SEPTEMBER 11TH VICTIM'S COMPENSATION IS TO COMPENSATE THE DEPENDENTS OF A DECEASED VICTIM

The September 11th Victim Compensation Fund of 2001, Title IV of Public Law 107-42, 115 Stat 230, 67 Federal Reg. 11,234 (March 13, 2002) 28 C.F.R. 104, was intended to compensate the victims of this atrocity, or their dependent survivors. If a "victim" was killed, then those who were deprived of the economic benefit of the victim were to be compensated. ("victim" defined at 28 C.F.R § 104.3 (e), 66 C.F.R. 66282 as amended at 67 C.F.R. 11246, March 13, 2002). All of Special Master's regulations and decisions were implemented to determine an award to compensate those dependents who were deprived of the economic benefit of the deceased victims. The purpose of the Fund was to make certain as much as possible that those persons who relied on the income of the victim received the Fund benefits.

In this case, the facts are clear. Alfred G. Marchand died when the aircraft where he was working as a flight alter crashed into the World Trade Center. Alfred Marchand left a surviving spouse, and a stepson, both of whom were determined to be dependents by decision of the Special Master. Alfred Marchand also left an adult son, Joshua Marchand, who was not a dependent. The New Mexico Supreme Court decided that the adult non-dependent son should receive the entire

economic award and the full award made to the Marchand probate estate. The non-dependent adult son received excessive compensation. He had no economic loss resulting from the death, yet he received $569,971.88. The dependent minor child received zero economic loss. The New Mexico Supreme Court erred.

The absurdity of the decision by the New Mexico Supreme Court can be more clearly understood if the facts were changed slightly. Suppose, hypothetically, that the victim was a 44 year old female flight attendant who was survived by her dependent spouse and his dependent minor stepson. Her dependent spouse is a disabled cancer stricken former veteran, who won the Medal of Honor. Her dependent stepson is a normal high school freshman. She is also survived by her natural adult son from a former marriage who is a multi-millionaire trust fund recipient. According to the precedent created by the New Mexico Supreme Court, the multi-millionaire son would receive all of the economic award from the Fund while the cancer patient dependent surviving spouse and stepson would receive nothing. Such a result is not what was intended by the United States Congress when it provided funds for victims. The only way to protect victim's rights under special federal legislation, the September 11th Victim Compensation Fund, is for the Supreme Court of the United States to provide the precedent and the guidelines in support of this historic legislation.

POINT II.

THE ROLE OF THE SPECIAL MASTER

The case presents a unique opportunity to comprehend and clarify the role of a federally authorized Special Master empowered to distribute funds to compensate victims of the national tragedy of September 11th. See *Schneider v. Feinberg,* 345 F.3d 135 (2d Cir. 2003). The Special Master has the authority by the federal regulations, ". . . to provide adequate guidance to a court of competent jurisdiction". 28 C.F.R. §104.33(g), 66 C.F.R. 66282 as amended at 67 C.F.R 11246, March 13, 2002.

The powers and the authority of the Special Master of the September 11th Victim's Compensation Fund was presented and considered by the New Mexico Courts,. The trial Court, which is the State District Court, stated that:

> 2. The Court finds that there is no genuine issue of material fact that the "final award" arising out of this claim upon the September 11th Victims Compensation Fund is $769,971.88.
> 3. The Court finds that the "collateral offsets" deducted from the total damages by the Special Master to arrive at the "final award" are not subject to review or re-allocation by this Court except that the Court holds that it is consistent with the apparent Congressional intent that they be offset against general economic damages.

4. The Court finds that the $100,000, non-economic damage award to the surviving spouse, Rebecca L. Marchand, is a part of the "final award" and was awarded "as directed by the Special Master" and is not subject to review or re-allocation by this Court.

5. The Court finds that the $100,000, non-economic damaged award to the dependent child Trae Hale is a part of the "final award" and was awarded "as directed by the Special Master" and is not subject to review or re-allocation by this Court.

6. The Court holds that the remaining amount of the "final award" ($769,971.88 -$450,000 = $319,971.88) was awarded by the Special Master as economic damages which are community property under Section 45-2-102, NMSA, and pass to the surviving spouse.

7. The Court holds that the $250,000, general non-economic damage award is a part of the "final award" which was not allocated "as directed by the Special Master" among the claimants and it is separate property of the Decedent. Under Section 45-2-102, NMSA, Plaintiff, surviving child, is entitled to ¾ of this amount ($187,500) and Defendant surviving spouse is entitled to ¼ ($62,500) of this amount.

(Brief in Chief Appendix, p. 44, paragraphs 3-7. Summary Judgment by the District Court, pps. A-43 through A-46).

The State District Court (trial court) awarded the surviving spouse, Rebecca Marchand, all of the economic damages. This is the same result contemplated by the Special Master. It is uncontradicted in the record that the New Mexico District Court is a Court of Competent jurisdiction.

The New Mexico Court of Appeals also addressed the role of the Special Master. The New Mexico Court of Appeals stated:

> {26} With regard to Joshua's contentions, he misconstrues the Special Master's directions that compensation for economic loss is to be generally distributed according to the wrongful death laws of the decedent's domicile and misinterprets the law. First, as stated above, our wrongful death law directs that the economic loss award be split between Rebecca and Joshua. Second, with regard to Joshua's contention that the collateral offsets were improperly applied in this case, we note that Congress bestowed great discretion on the Special Master to determine appropriate offsets, and we cannot say that based on its directives, the Special Master erred in this case. See, e.g., 28 C.F.R. § 104.47(a) (providing that when determining the appropriate collateral

> offsets the Special Master may employ an appropriate methodology).

(Brief, p. A-37, paragraph 26, *Marchand v. Marchand*, 142 N.M. 795, 171 P.3d 309 (Ct. App. 2007)).

The New Mexico Court of Appeals considered the Special Masters directions and found that the Special Master did not err in this case by awarding the surviving spouse one-half of the economic damages. The New Mexico Court of Appeals is a Court of Competent jurisdiction.

The New Mexico Supreme Court also addressed the role of the Special Master in several places in its opinion in *Marchand v. Marchand*. 2008 NMSC-065, 199 P.3d 28, (N.M. 2008). In particular, the New Mexico Supreme Court stated: "Under these circumstances, the Special Master's directive embodies a basic notion of fairness". (Petitioners Brief, Appendix A-15). The New Mexico Supreme Court then proceeds to reinterpret the decision of the Special Master, while ignoring completely the Final Report of the Special Master. (United States Department of Justice, Kenneth R. Feinberg, Esq. "Final Report for the September 11th Victims Compensation Fund of 2001, Vol. I, November 18, 2004).

Because the Final Report had been discussed during oral argument before the Court, it was reproduced in substantial portion in the Motion for Rehearing. The Supreme Court of New Mexico was aware of the Final Report of the Special Master. Questions addressed to the Petitioner during oral

argument asked for interpretations of matters contained in the Final Report. I have no explanation for the short-term memory loss of counsel for the Respondent who argues that the Final Report was never considered by the New Mexico Courts. Nevertheless, the Final Report of Kenneth Feinberg, Esq., the Special Master of the September 11th Victims Compensation Fund was completely ignored by the New Mexico Supreme Court in its published opinion. The failure to respect the guidance given by the Final Report of the Special Master for its policy and precedential value is creating bad law.

The Special Master is absolutely clear that he authorized distributions to the surviving spouse from the Fund in an amount of at least one-half of the economic loss award in every one of the more than 2800 cases decided by his office. See *Final Report*, p.57. There can be little doubt that the Special Master had the Congressional authority under the Act and the Federal Regulation's to do so. (Air Stabilization Act § 405 (b), 49 U.S.C.A. 40101). He even had the general authority to provide adequate guidance for a court of competent jurisdiction §104.33. The Special Master's determination is final and not subject to judicial review, See Air Stabilization Act § 405 (b) (3), 49 U.S.C.A. 40101.

The New Mexico Supreme Court apparently decided that "its interpretation" of the Special Master's rulings and policy would override the Special Master's own interpretation of his precedent and his "basic notice of fairness", embodied in the Final Report of the Special Master.

The proper approach to the issue of collateral offsets, as confirmed by the Final Report, could have been to award the entire amount of the economic loss to the surviving spouse. This approach is consistent with the concepts underlying the September 11th Victims Compensation Fund which are to compensate those who were deprived of the economic benefit of the victims. The point was to make certain that the persons who relied on the income of the victim received the benefits. These are his dependents; the surviving spouse, Rebecca Marchand and his stepson. Instead, the New Mexico Supreme Court took the non-economic awards off the top and then divided the remainder as economic loss. As a result, the non-dependent adult son, Joshua Marchand received excessive compensation because he had suffered no economic loss resulting from the death of the victim. That the adult non-dependent child received the entire economic loss is completely contradicted by the policy statement and summary of awards made by the Special Master and set out in the Final Report.

Even the New Mexico Supreme Court recognizes that ". . . the Act and accompanying regulations do not expressly require that an individual share of the fund award must be reduced by the amount of collateral benefits that individual received". Petitioners Brief, Appendix A-13, *Marchand v. Marchand* 2008 NMSC-065, paragraph 24. However, the New Mexico Supreme Court then goes on to reduce the dependents share based upon a decision in a workman's compensation case. *Strickland v. Roosevelt County Rural Electric Corp,* 103 N.M. 63, 702 P.2d 1008 (Ct. App. 1984). The *Strickland* case holds that there should be no "double

recovery" when collateral offsets are considered in the context of a workmen's compensation claim. There is no double recovery here. The economic award to the surviving spouse, Rebecca Marchand is just enough to make her whole by compensating her for the deprivation of the economic benefit of the victim; her husband, Alfred G. Marchand. The law of workman's compensation has no application and no value as precedent in a case involving the September 11th Victim Compensation Fund. The New Mexico Supreme Court erred. All of the other victim compensation fund cases were heard and decided by the Special Master. It is the Special Master's rules and policy about "fairness" when determining compensation which could reach the level of "res judicata". The Special Master has advised that Rebecca Marchand is entitled to some or all of the economic loss compensation of the award. It is the congressional intent underlying the September 11th Victims Compensation Fund made clear by the Final Report of the Special Master which are in need of support by this Court.

POINT III.

CHEVRON DEFERENCE

It is no small matter that the Final Report of the Special Master should be given deference. According to the Act, the decisions of the Special Master are final and not subject to judicial review, Air Stabilization Act § 405 (b)(1) 49 U.S.C.A. 40101. Furthermore, the administrative law decisions entered by the Special Master are proper and should be given deference for their precedential value or "to provide adequate guidance" to our courts. The

decisions of the Special Master are summarized in his Final Report, and the reasons supporting his decisions are explained in the Final Report.

To ignore the pronouncements, logic and reasoning of the Special Master contained in his Final Report, while stating that, "The Special Master's directive (Final Report) embodies all basic notion of fairness" almost defies comment. There are available for review the September 11th Fund Regulations, Claim Forms, and the Final Report which make it evident that the Special Master had the authority to determine how the compensation award was made in every case, and to set the policy and precedent that no surviving spouse should receive less than one-half of the Fund award.

The Final Report of the Special Master must be given deference. See *Chevron USA v. Natural Resources Defense Counsel*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed. 2d 694 (1984); see also *Schneider v. Feinberg*, 345 F.3d 135 (2d Cir. 2003). Otherwise, there can be no explanation why the Final Report was required by Congress, or why the experience, wisdom, and dedication of the Special Master will be without judicial significance.

CONCLUSION

I respectfully request that the Supreme Court of the United States act in partnership with the Special Master on the September 11th Victims Compensation Fund, Kenneth Feinberg. Esq., to provide equal justice to all surviving spouses and dependents of the victims of the September 11th tragedy.

Our system of justice must be able to know in advance what to do when we have to deal with a public compensation scheme that not only provides financial relief for the victims but also expresses a shared national grief in response to a terrible national tragedy.

Congress gave the Special Master the lawful authority to compensate the surviving spouse of deceased victims. This court has the power to confirm the precedent stated by the Special Master in his Final Report and achieve the result he envisioned in this case, which is to award the surviving spouse and dependent child their fair share of the economic loss award. This Court can confirm the Summary Judgment of New Mexico District Court which awarded Rebecca Marchand all of the economic loss. This Court can confirm the award of the New Mexico Court of Appeals which awarded the surviving spouse one-half of the economic loss. The Court should reverse the New Mexico Supreme Court award of zero economic loss to the victim's dependents, Rebecca Marchand and Trae Hale. The September 11th Victim Compensation Fund was created to compensate those who were deprived of the economic benefit of the victim. In this case they are the surviving spouse, Rebecca Marchand and her son.

For the foregoing reasons, the Petition for the Writ of Certiorari should be granted.

Respectfully submitted,

_____

Stevan J. Schoen, Esq.
Attorney at Law
Counsel for Petitioner,
Rebecca Marchand, Individually and as the
Personal Representative of the Estate
Alfred G. Marchand, Deceased
4 Hillside Drive
Placitas, N.M. 87043
(505) 867-2802